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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Columbus-America Discovery Group, Inc. and the respondents Atlantic Mutual Insurance Company; Insurance Company of North America; Salvage Association; London Assurance; Alliance Assurance Company, Ltd.; Royal Exchange Assurance; Indemnity Marine Assurance Company, Ltd.; Marine Insurance Company, Ltd.; and the Superintendent of Insurance of the State of New York.

Harry G. John, Jack F. Grimm, and the Trustees of Columbia University in the City of New York were separate appellants in the court below on the sole issue of whether it was appropriate for the district court to grant their motion to intervene on the condition that they proceed immediately to trial. Because that issue is not addressed in this petition, Harry G. John, Jack F. Grimm, and the Trustees of Columbia University of the City of New York are not named as parties herein.

The respondents before this Court include Insurance Company of North America; Salvage Association; London Assurance; Alliance Assurance Company, Ltd.; Royal Exchange Assurance; Indemnity Marine Assurance Company, Ltd.; Marine Insurance Company, Ltd.; and the Superintendent of Insurance of the State of New York.

Pursuant to Supreme Court Rule 29.1, the Court is advised that the petitioner does not have any parent companies or any subsidiaries that are not wholly-owned.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated August 26, 1992, is reported at 974 F.2d 450 and is reproduced at page 1a of the Appendix to this Petition ("Pet. App."). The opinion of the United States District Court for the Eastern District of Virginia, dated August 14, 1990, is reported at 742 F. Supp. 1327 and is reproduced at Pet. App. 60a. The Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and denying rehearing *in banc*, dated October 15, 1992, is not yet reported and is reproduced at Pet. App. 105a.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1992. Pet. App. 5a. The court of appeals

denied a timely Petition for Rehearing on October 15, 1992. Pet. App. 110a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, section 2, clause 1 of the Constitution of the United States provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . ."

STATEMENT OF THE CASE

This is an admiralty action brought to adjudicate rights in a celebrated sunken treasure. Petitioner Columbus-America Discovery Group ("Columbus-America") discovered the gold-laden shipwreck 130 years after it sank to the bottom of the Atlantic Ocean in a famous maritime disaster. The district court awarded petitioner legal right to the abandoned treasure as its finder. The court of appeals reversed, however, recognizing claims asserted by numerous insurance companies that allegedly had insured the lost gold, but had taken no steps in the intervening century to retrieve it. Over a strong dissent, the court of appeals held that Columbus-America was not entitled to ownership of the gold it retrieved from the sea, but must seek compensation under the law of salvage. The full court of appeals split 7 to 5 in denying rehearing *in banc*, with one of the two judges in the original panel majority voting for *in banc* consideration of the significant issues involved.

This is the case of the famous shipwreck S.S. CENTRAL AMERICA. *See generally* Pet. App. 61a-63a; Pet. App. 7a-11a; Noonan, *The Greatest Treasure Ever Found*, Life, Mar. 1992, at 32. The wooden-hulled, three-masted, luxury sidewheel steamer began its fateful voyage on September 3, 1857. The ship carried approximately 600 passengers from California and several tons of gold coins, bars, and dust produced during the gold rush and its entrepre-

neurial aftermath. In those days, prior to the completion of the intercontinental railroad, swiftest passage from the west coast to the east was by steamer from San Francisco to Panama, by rail across the isthmus, then on from the port of Aspinwall to New York by way of Havana. The CENTRAL AMERICA plied the last leg of this route, and is said to have carried one third of all the gold shipped during her era from California to the east.[1]

The CENTRAL AMERICA's passenger manifest listed numerous notables, prospectors, and speculators, many of whom had found their fortunes in the gold fields. Others, including California Judge Alonzo Castle Monson, who had lost his house and all his money in a memorable poker game, were less fortunate. All aboard were headed into history. Soon after leaving Havana, the ship sailed straight into the teeth of a tropical hurricane. The commander, crew, and passengers fought heroically for three days and nights, finally bailing water for thirty hours without rest. Despite their efforts, the ship went down on the night of September 12 in 8,000 feet of water, some 180 miles east of Charleston, South Carolina, where the Gulf Stream meets the Sargasso Sea.

Passing ships rescued 150 of the passengers, but more than 400 persons perished in the sinking. Reports of the tragedy contain vivid accounts of miners flinging down hard-won sacks of gold in despair on realizing their imminent doom. Virtually all of the gold aboard was lost. The value of the gold on board—including both commercial shipments and the gold belonging to individual passengers—was estimated in 1857 to be in excess of $2 million. This included commercial shipments from bankers,

[1] Even before her epic sinking, the CENTRAL AMERICA had become notable in American history, transporting the first treaty between the United States and Japan, signed by Commodore Matthew Perry, and sailing under the command of William Lewis Herndon, whose exploration of the Amazon inspired Mark Twain and whose heroism during the sinking at issue here led the U.S. Naval Academy to erect the Herndon Monument in Annapolis.

merchants, and express companies, including Levi Straus and Wells Fargo. So great was the magnitude of the loss that some historians have recognized the event as a contributing cause of the Panic of 1857. The court of appeals estimated the current value of the treasure to be as much as $1 billion. Pet. App. 6a.

The CENTRAL AMERICA remained a lost legend until six generations later, when it captured the imaginations of three friends from Columbus, Ohio. They formed Columbus-America Discovery Group, a team of engineers, historians, entrepreneurs, and scientists, to pursue their dream of finding, recovering, and restoring the shipwreck. The thirteen-year effort culminated in risky and extensive at-sea search operations, aided by innovative techniques employing probability analysis, search theory, side-scanning sonar, image processing, and robotics. *See* Pet. App. 111a (a sonar image of the type employed in the search). Columbus-America adapted and enhanced many of these technological innovations specifically for the project.[2] After a lengthy search, including initial recovery operations at a wreck first thought to be the CENTRAL AMERICA but later determined to be another ship, the years of effort paid off.

In 1987, Columbus-America commenced an admiralty action *in rem* in the United States District Court for the Eastern District of Virginia, seeking confirmation of title to the shipwreck. The district court asserted jurisdiction under 28 U.S.C. § 1333, the general grant of admiralty jurisdiction to the federal district courts. Pet. App. 73a. During the next two years, Columbus-America con-

[2] The pioneering maritime search methods developed and used in the search for the CENTRAL AMERICA, as well as their significance for the future of maritime search and recovery, are discussed and diagrammed in a recent article published by the journal of the Institute of Management Sciences. *See* Stone, *Search for the* S.S. Central America*: Mathematical Treasure Hunting*, 22 Interfaces 32 (1992).

tinued its search and recovery operations, while at the same time fending off litigation from rival search groups. The district court issued injunctions protecting Columbus-America's search as it progressed and prohibiting interference with Columbus-America's recovery efforts. Pet. App. 68a.

Using their advanced deep-sea robot (named *Nemo*), Columbus-America began recovering and preserving artifacts from the ocean floor. *See* Pet. App. 64a, 111a. Since then, Columbus-America has not only recovered gold, *see* Pet. App. 112a, but also has devoted substantial resources to promoting the scientific, historic, and educational value of the shipwreck, producing two interactive laser video disc educational packages for secondary schools, publishing a book, and creating a museum exhibit and other materials of interest both to the general public and the scientific community. Columbus-America has also supported an international adjunct science and education program, researching such diverse areas as deep-sea site degradation mechanics and food chain processes and discovering eleven new species of marine life.[3]

Following Columbus-America's public announcement of substantial gold recoveries in September 1989, however, thirty-nine claimants purporting to be insurers or their successors in interest appeared. Pet. App. 69a. The companies filed pleadings asserting that they were the owners of the gold in the commercial shipments aboard the CENTRAL AMERICA by virtue of insurance claims they alleged to have paid upon its loss, and demanded possession of the treasure Columbus-America had found and recovered. *Id.* After extensive discovery, the district court scheduled a trial for April 1990. With the consent of the parties, the trial was bifurcated. Pet. App. 72a.

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[3] Columbus-America's efforts to find, recover and conserve scientific and historical data associated with the project were found to be exemplary. *Columbus-America v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 1989 A.M.C. 1955, 1958 (E.D. Va. 1989).

The initial determination to be made by the district court was whether the facts showed that the CENTRAL AMERICA was abandoned. If the wreck was abandoned, Columbus-America would be entitled to sole possession under the law of finds. If not, the insurance companies would be entitled to assert ownership under the law of salvage, with Columbus-America being relegated to compensation as a salvor. *Id.*

The district court heard the testimony of numerous witnesses and examined hundreds of exhibits. After considering further briefs and oral arguments in July 1990, the district court rejected the claims of the insurance companies on August 14, 1990. Pet. App. 60a. Relying upon a long line of authority, the district court held that whether a wreck has been abandoned is a question of fact. Abandonment is a "question of intent, which may be inferred from all of the relevant facts and circumstances." Pet. App. 75a. The district court noted that modern decisions have "rejected the salvage law theory that title to property can never be lost. They have instead applied the law of finds under the doctrine of *animus revertendi* (the owner has no intention of returning)." Pet. App. 76a. While lapse of time and non-use "are not sufficient, in and of themselves, to constitute abandonment, under certain circumstances, they may give rise to an implication of intention to abandon." Pet. App. 78a (citing cases).

Applying the law to the facts before it, the district court found that Columbus-America had established "by clear and convincing evidence that each of the insurance companies long ago abandoned any claim, right, title or interest that they may have had in the gold aboard the CENTRAL AMERICA." Pet. App. 102a. The insurers had relied upon old newspaper accounts to establish the general proposition that they had paid claims upon the lost gold. The court noted that "[w]ithout the newspaper accounts, the evidence is totally insufficient to establish

any claim of the insurance companies." Pet. App. 89a. The court further found that to "say there are numerous conflicts in the newspaper accounts and reports is conservative." Pet. App. 90a.

On the question of abandonment, the court found that the insurers' actions since the sinking "speak clearly." Pet. App. 96a. Since 1858, no insurer had taken any steps to recover the wreck.[4] None took any action during the twenty years prior to Columbus-America's discovery, notwithstanding the advent of modern recovery technology. Pet. App. 97a. No insurer stepped forward even during Columbus-America's search and the surrounding litigation despite knowledge of the suit—until Columbus-America brought gold ashore. Pet. App. 98a. Most significantly, the evidence showed that the insurance companies destroyed virtually all documents they might have had relating to CENTRAL AMERICA claims, despite the insurers' own testimony that a company intending to assert its right of subrogation will keep such documents, and despite the fact that other documents were retained for more than 100 years. Pet. App. 95a-99a.

In short, the district court rejected the position of the insurance companies—that no abandonment could be found because "they never signed any document so stating, never made any public announcement of abandonment and have always claimed to own the gold." Pet. App. 97a. "A clear intention of abandonment is given when all records or memorandum of the property are deliberately destroyed and no effort is made or undertaken to locate or recover the property for over a hundred

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[4] Atlantic Mutual Insurance Company and Sun Mutual Insurance Company signed a contract in 1858 with Brutus de Villeroi for an attempted salvage. Villeroi was to undertake the salvage by inventing a submarine boat at his own expense. Nothing ever came of this venture, and since that time the "record is totally void of any effort or activity on the part of any of the insurance companies to attempt to locate or recover the Central America." Pet. App. 94a.

years." Pet. App. 102a. Accordingly, the district court applied the law of finds, and awarded title to Columbus-America as the finder of the CENTRAL AMERICA. *Id.*

A sharply divided Fourth Circuit panel reversed. The court of appeals rejected the line of authority applying the law of finds to long-lost wrecks, holding that these precedents are applicable only where no purported previous owner appears. Pet. App. 21a. Where any party purporting to claim ownership is identified, the court of appeals held, abandonment cannot be found unless the finder proves by "clear and convincing evidence" that the owner made an "express" abandonment. Pet. App. 20a, 27a. The only showing that the court of appeals said would satisfy its strict test was "an owner's express declaration abandoning title." Pet. App. 27a. Applying its test, the court of appeals proceeded to dismiss the district court's evaluation of the witnesses and evidence. Pet. App. 29a-34a. Since there was obviously no showing that the insurance companies had signed a formal document or made a public announcement disclaiming the gold, the court of appeals remanded for application of the law of salvage and a determination of what share of the treasure each insurer should receive.[5] In short, the Fourth Circuit held that (apart from the unrealistic scenario of an express renunciation of treasure) there simply can be no finding of abandonment when a purported owner appears. Pet. App. 21a ("By contrast, parties who intend to assert a claim of ownership may be

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[5] The court of appeals recognized that the insurance companies could assert rights only to the commercial shipments of gold. Accordingly, Columbus-America was entitled (in theory) to claim all the passenger gold, which "almost surprisingly," no descendant had attempted to claim. Pet. App. 28a. To claim this gold, however, the Fourth Circuit would require Columbus-America to prove—despite the lack of documentation and the 130 years the gold had spent beneath the ocean—that each piece of gold found was more likely than not passenger gold, or to assert rights as a finder to any surplus of gold over and above the value of the commercial shipment. *Id.*

identified. In such a case the law of salvage is applied.").[6]

Judge Widener dissented, criticizing the majority for "its principal holding that the district court's factual finding of abandonment was clearly erroneous; in applying the law of salvage to a long-lost wreck; [and] in making factual findings as an appellate court." Pet. App. 41a-42a. Judge Widener canvassed the law governing abandonment to demonstrate that the majority's new requirement of express abandonment "cannot be reconciled" with the long line of maritime and common law authority establishing that abandonment may be inferred from all the surrounding facts and circumstances. Pet. App. 42a-52a. The dissent also pointed out that the majority's refusal to allow the application of the law of finds to long-lost wrecks "breaks with the law of every other circuit that has decided the question." Pet. App. 54a. Judge Widener also observed that the majority opinion improperly substituted its own judgment for that of the district court, violating this Court's proscription of appellate fact-finding in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Pet. App. 40a.[7]

The court of appeals split 7-5 in denying rehearing and rehearing *in banc*, with Judge Wilkinson not participating. Judge Hall, who had joined Judge Russell's majority opinion on the panel, voted against panel rehearing, but voted for consideration of the case by the full court *in banc*. Pet. App. 110a.

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[6] The court of appeals also held that the district court had placed improper conditions upon the intervention of three parties who appeared in the case on the eve of trial, claiming they had furnished information that assisted in Columbus-America's search. Pet. App. 78a-79a. That ruling is not in issue here.

[7] Ironically, the Fourth Circuit panel in this case was the same panel that decided *Bessemer City* in the court of appeals. *See Anderson v. Bessemer City*, 717 F.2d 149, 150 (4th Cir. 1983).

REASONS FOR GRANTING THE WRIT

The Court's attention is warranted to address the significant legal and practical consequences of the opinion below. By limiting the concept of abandonment to cases of express renunciation of title or the failure of any purported owner to appear, thereby foreclosing application of the law of finds, the opinion below conflicts with the opinions of courts of appeals, district courts, and state supreme courts. The court of appeals' rule invites stale claims upon every maritime recovery of a valuable long-lost wreck. Given the extraordinary amount of attention this case has received from the public and the admiralty bar, the Court's action here is certain to have critical effects on the emerging industry of high technology maritime recovery. The disposition of this case also has important implications for state and federal management of historic shipwrecks under statutes governing "abandoned" maritime property. This case is an appropriate vehicle for resolution of a nationally important maritime issue.

I. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AND THE STATES OVER THE TEST FOR DETERMINING WHETHER LONG-LOST MARITIME PROPERTY IS ABANDONED AND THEREFORE SUBJECT TO THE LAW OF FINDS

This case calls upon the Court to address the standard for finding "abandonment" of long-lost sunken vessels. Resolution of the case must therefore also determine the circumstances in which title to long-lost sunken shipwrecks will be governed by the law of finds as opposed to the law of salvage.[8] The opinion below breaks with the

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[8] This Court has adverted to the application of finds law to a shipwreck, but has not had occasion directly to address the issue. *See Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 677 & n.8 (1982) (Opinion of Stevens, J.) (discussing district court's application of *animus revertendi* doctrine and consequent vesting of ownership in sunken vessel's finder).

law of other courts, both by precluding a finding of abandonment except upon an express renunciation of title and by foreclosing the application of the law of finds.

A. Federal Circuits, District Courts, and State Supreme Courts Infer Abandonment as a Fact From All Relevant Circumstances, and Apply the Law of Finds to Long-Lost Wrecks

This case presents a choice between two contrasting approaches to ownership of property lost at sea. Salvage law, on the one hand, presumes that even where the original owner of a vessel has no hope of recovery or return, title remains in the owner. A salvor who recovers the property does not become its owner, but is entitled to monetary compensation in the form of a salvage award. *See* Pet. App. 17a (citing 3A M. Norris, *Benedict on Admiralty: The Law of Salvage* § 158, at 11-15 (1992)). Under the law of finds, in contrast, a sunken vessel whose owner has no hope or intention of returning may be considered abandoned or derelict, and the party who finds it acquires ownership of the property itself. *See, e.g.*, *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978); T. Schoenbaum, *Admiralty and Maritime Law* § 15-7 (1987).

Prior to the opinion below, "[m]odern courts . . . have rejected the salvage law theory that title to property can never be lost. They have instead applied the law of finds under the doctrine of 'animus revertendi' (the owner has no intention of returning)." *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd without opinion*, 775 F.2d 302 (11th Cir. 1985). Whether sunken property is abandoned has traditionally been understood to be a question of fact. *E.g.*, *Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198 n.11 (5th Cir. 1989); Pet. App. 41a (citing cases). Under the general maritime and common law, a formal declaration of abandonment is not necessary, and abandon-

ment may be inferred from all of the relevant facts and circumstances and may be determined on the basis of circumstantial evidence. *See, e.g., United States v. Sylvester*, 848 F.2d 520, 525 (5th Cir. 1988); *Hatteras, Inc. v. U.S.S. Hatteras*, 1984 A.M.C. 1094, 1097 n.5 (S.D. Tex. 1981). *See generally* 1 Am. Jur. 2d *Abandoned, Lost and Unclaimed Property* § 40 (1962) ("[I]t is not necessary to prove intention to abandon by express declarations or other direct evidence. . . ."). The general rule is to be distinguished from the requirement of express abandonment that applies to property of the sovereign. *See United States v. Steinmetz*, 973 F.2d 212, 223 (3rd Cir. 1992) ("[A]lthough an inference of abandonment can sometimes be made from non-use of private property, property of the United States can only be abandoned as authorized by Congress."), *petition for cert. filed*, 61 U.S.L.W. 3452 (U.S. Nov. 18, 1992) (No. 92-859).

The failure of the original owner to take any steps to protect its interest in the property over a long period of time is a circumstance that has been given considerable weight in assessing the facts. While they are not proof in themselves of abandonment, the inference of abandonment may arise from lapse of time and non-use of property. *E.g., Chance*, 606 F. Supp. at 804. *See also United States v. Smiley*, 27 F. Cas. 1132, 1134 (C.C.N.D. Cal. 1864) (No. 16,317) (Field, J.) (cargo from sunken sister ship of CENTRAL AMERICA abandoned when "all efforts to recover the property had been given up"); *Wyman v. Hurlburt*, 12 Ohio 81, 87 (1843) (vessel abandoned when "all hope, expectation, and intention to recover property were utterly and entirely relinquished"); Annotation, *Rights in and Ownership of Wrecked or Derelict Vessels and Their Contents Not Cast Upon the Shore*, 63 A.L.R. 2d 1369, 1374 (1959) ("The most significant factor indicating abandonment appears to be the passage of a considerable length of time without effort on the part of the owners to secure repossession of their property.").

Applying these principles in the context presented here, other courts of appeals have applied the law of finds to long-lost shipwrecks. The First Circuit, for example, applied the law of finds instead of salvage law to determine rights in a vessel that sank in 1909:

> As we plunge into the merits of the appeal, we must first acknowledge that there is a generic question as to when the law of finds—the ancient and honorable doctrine of 'finders, keepers'—applies to property retrieved from the ocean floor, and when the law of salvage pertains. Yet, in cases where (1) articles have been *presumptively abandoned, i.e., either* affirmatively renounced, *or* so long lost that time can be presumed to have eroded any realistic claim of original title, and (2) those articles are now in hand, having been actually recovered, the better-reasoned authorities agree that the law of finds may appropriately be utilized.

Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1064-65 (1st Cir. 1987) (emphasis added) (citing *Chance*, 606 F. Supp. at 804). The Fifth Circuit and the Eleventh Circuit have similarly applied the law of finds to long-lost wrecks. *See Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) ("The common law of finds is the appropriate law to examine to determine the ownership of the shipwreck."); *Treasure Salvors*, 569 F.2d at 337 ("Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.").

Other federal courts and state supreme courts have similarly applied the law of finds to long-lost shipwrecks. *See Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1385 (S.D. Fla. 1988); *Indian River Recovery Co. v. The China*, 645 F. Supp. 141, 144 (D. Del. 1986); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452,

456 (E.D. Va. 1960); *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 552 (Mass. 1988); *see also Sub-Sal, Inc. v. The DeBraak*, No. 84-296, 1992 WL 39050, at *1-2, 1992 U.S. DIST. LEXIS 2461, at *7-8 D. Del. 1992) ("Cognizant that the application of salvage law involves a presumption that the owner of an abandoned vessel has not been divested of title, this Court rejects the salvage law theory.").

B. The Opinion Below Creates a Conflict by Limiting Abandonment to Cases of Express Renunciation of Ownership and Foreclosing Application of the Law of Finds

In contrast to these cases stands the court of appeals' opinion. The Fourth Circuit rejects a factual inquiry into all the circumstances that other courts employ to determine abandonment. Despite the fact that the dissent cited over a dozen cases and treatises for the proposition that abandonment is a question of fact, this accepted principle of law is "unmentioned in the majority opinion." Pet. App. 41a. The court of appeals also rejected the principle that abandonment need not be shown by express declaration, but may be inferred from all surrounding facts and circumstances. Instead, abandonment can only be proved under the court of appeals' approach "by clear and convincing evidence . . . such as an owner's express declaration abandoning title." Pet. App. 27a. As the panel dissent put it: "The majority's holding, by necessary implication, must be that abandonment can only be shown by an express statement by the owner indicating his intention to abandon." Pet. App. 43a.

The majority's opinion makes clear that no factual showing of abandonment based on circumstantial evidence can ever be made. The opinion states that finds law should be applied "where the previous owners are found to have abandoned their property." Pet. App. 27a. But this finding can occur in only "two categories" of cases—either where owners have "expressly and publicly aban-

doned their property" or where "no owner appears." Pet. App. 21a. There is no role under the Fourth Circuit's test for an inquiry into factual circumstances under the doctrine of *animus revertendi*. The Fourth Circuit found support for its view in a recent district court case in which an insurance company claimed property under the law of salvage from a 130 year-old Lake Michigan shipwreck. *See Zych v. Unidentified, Wrecked and Abandoned Vessel*, 755 F. Supp. 213 (N.D. Ill. 1991), *vacated and remanded on other grounds*, 960 F.2d 665 (7th Cir.), *cert. denied*, 61 U.S.L.W. 3370 (1992).

Under the Fourth Circuit's test, no abandonment can be found absent an express declaration renouncing title. Since such an express declaration will never occur in the case of valuables, salvage law will govern in the Fourth Circuit in any case where a purported owner appears, whether the successor to a defunct insurance company, an alleged descendant, or a legatee. Pet. App. 21a (where parties who "intend to assert a claim of ownership" appear, salvage law applies). So clear is the outcome under this test that the Fourth Circuit majority observed in reference to the bifurcated trial that "the necessity of having a second phase should have appeared fairly certain to the district court" even before hearing any of the extensive factual evidence of abandonment in this case. Pet. App. 39a.

C. This Is an Appropriate Case in Which to Resolve the Conflict and Provide Guidance on the Law Applicable to the Recovery of Long-Lost Wrecks

This case provides an appropriate vehicle for the Court to provide guidance on the admiralty law applicable to long-lost shipwrecks. The district court's published opinion sets forth clear findings of fact upon a well-developed record. The court of appeals reversed the district court's finding on the basis of a clearly stated rule against abandonment in any case in which an owner appears. While further proceedings in the district court will determine

the appropriate size of a salvage award, no further proceedings can alter the court of appeals' resolution of the legal issue concerning the definition of abandonment and consequent application of the law of salvage.

The court of appeals' attempts to distinguish the several opinions applying the law of finds to long-lost shipwrecks do not diminish the need for the Court's review. The court of appeals dismissed the other circuits' extensive discussions of the law of finds and salvage by observing that in those cases no owners had come forward. Pet. App. 22a. Nothing in the other courts of appeals' opinions, however, indicates that the failure of the owner to appear was dispositive. *See* Pet. App. 48a. And the panel majority conceded that one state supreme court case relied upon by Columbus-America awarded title to a finder against an undisputed original owner, while another endorsed this result, at least in dicta. *See* Pet. App. 24a-26a (discussing *Wyman v. Hurlburt*, 12 Ohio 81 (1843), and *Eads v. Brazelton*, 22 Ark. 499 (1861)). Moreover, it is clear that on the same facts the Fourth Circuit and the other courts will reach different results.

The approach of the First Circuit and other cases treats long-lost wrecks as "presumptively abandoned," *Martha's Vineyard*, 833 F.2d at 1065, or at least treats the issue as one of fact. The Fourth Circuit employs the *opposite* presumption, and it makes the presumption virtually irrebuttable. *See* Pet. App. 27a. Passage of time, the elements, and loss of documents and memory will make the applicable presumption dispositive in long-lost shipwreck cases. Under the first approach, insurance companies that have destroyed the documents proving ownership and taken no steps whatever to recover the wreck will be found to have abandoned their claims, and property will belong to those who have risked their money and lives to recover it. Under the other approach, successors of defunct insurance companies (who may long ago have recouped their losses through increased premiums) are

assured the right to grab a share of gold once others have brought it to the surface.

The divergence in the approaches of maritime courts to adjudicating claims in long-lost shipwrecks is plain. *Compare* Pet. App. 18a-19a (in contrast to "harsh, primitive, and inflexible" law of finds, salvage law lessens possibility of clashes between would-be salvors) *with Treasure Salvors*, 569 F.2d at 337 n.11 (rejecting this criticism of finds law). Commentators have recognized that the issue is a significant and unsettled one. *See* Schoenbaum, *supra*, at 513 ("cases are in conflict on several points" in approaching long-lost wrecks); Edelman, *Who Gets Treasure Recovered From Sea?*, N.Y.L.J., Dec. 4, 1992, at 3, 4 (discussing change in law effected by Fourth Circuit opinion, concluding: "How the law of finds will turn out in cases on the high seas will need resolution by the Supreme Court. What proof is needed to show abandonment?").

The Court's resolution of conflicts is especially important in the admiralty context. "The issue is one of importance in the development of the law maritime, as to which [the Supreme Court has] large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959). Part of this constitutional responsibility is upholding the "principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.'" *E.g.*, *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 322-23 (1990); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 (1970). That uniformity is threatened by the conflict created by the opinion below. A conflict among admiralty courts is even more intolerable in the context of shipwreck recovery, where venue is proper in any district where the recovered property may be brought upon recovery, giving every incentive for forum shopping. *See*, 28 U.S.C. § 1333; *Treasure Salvors v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567-68 (5th Cir. 1981). The Court should

grant certiorari to resolve the conflict and provide guidance to lower courts.

II. THE COURT'S ACTION IN THIS CLOSELY WATCHED CASE WILL HAVE IMPORTANT EFFECTS ON THE EMERGING FIELD OF HIGH TECHNOLOGY MARITIME RECOVERY AND THE PUBLIC ADMINISTRATION OF HISTORIC SHIPWRECKS

This case has already been recognized by the public, the maritime industry, and the admiralty bar as a landmark. Numerous articles in the popular press both in this country and abroad have recounted the search for the ship and its treaure.[9] Many have focused on the legal questions presented.[10] The case has received wide attention both from the trades associated with maritime recovery,[11] and

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[9] *See, e.g., Salvors Must Give Up Treasure,* USA Today, Aug. 28, 1992; *Divers Mine Depths for Treasures,* Washington Times, Oct. 19, 1990; *Sunken Treasure!,* Reader's Digest, Dec. 1990; *Chasser le Tresor et Garder l'or,* Agence France Press, Aug. 20, 1990; *Salvage Group Backed by Court,* International Herald Tribune, Aug. 16, 1990; *Treasure's Finders are Keepers,* USA Today, Aug. 15, 1990; *Pieces of Eight,* The Economist, Mar. 17, 1990; *The Sinking that Shook America,* U.S. News & World Report, Sept. 25, 1989; *Sunken Treasure,* The Economist, Aug. 26, 1989.

[10] *See, e.g., The Law of Finders-Keepers,* Washington Post, Aug. 15, 1990; *There's a New Wave in Sea Salvage Rules,* Wall Street Journal, May 14, 1990; *Law and Science Vie in Hunt for Sea's Treasures,* Los Angeles Times, Aug. 10, 1987; *Gains in Salvaging Raise Issue of Sites Beyond U.S. Limits,* N.Y. Times, Aug. 8, 1987.

[11] *See, e.g., 'Courting' The Treasure Of A Shipwreck,* Washington Letter of Oceanography, Oct. 5, 1992; *Appeals Court Denies Rehearing in Columbus-America Case,* Sea Technology, Nov. 1992; *Sea Salvage Law Could Solve Chaos of Space Debris,* Defense News, Dec. 10, 1990; *Judge Rules For Salvors In* Central America *Case,* Underwater USA, Oct. 1990; *Salvage Rights Debate on* Central America, Underwater USA, Apr. 1990; *Re Shipwrecks: Finders Can Be Keepers If Conditions Are Met,* Journal of Commerce, Dec. 14, 1989.

from the practicing bar.[12] Legal commentators as well have recognized that the case raises significant unresolved issues in admiralty law.[13] While the magnitude of the treasure alone makes this case significant,[14] the Court's action will have a broader impact.

A. New Advances in Marine Recovery Technology Have Multiplied Conflicts Over the Law of Long-Lost Shipwrecks, Requiring the Court's Attention

The development of new marine technology has made conflict among ancient admiralty law doctrines inevitable. With the development of ever-more sophisticated technologies for exploring the oceans, valuable items long thought hopelessly lost may be recovered, making the determination of abandonment an issue of growing significance. As a leading admiralty treatise states:

> These distinctions [between the law of finds and the law of salvage] assume new importance because tech-

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[12] *See, e.g., Finders of $1 Billion Booty Might be Weepers,* Chicago Daily Law Bulletin, Nov. 9, 1992; *$1 Billion Ruling,* ABA Journal, Oct. 1990; *Finders Keepers,* National Law Journal, Aug. 27, 1990; *The Case with the Midas Touch,* ABA Journal, May 1990; *Admiralty Specialist Turns Coal Into Gold,* American Lawyer, Sept. 1989.

[13] *See, e.g.,* Burke, *A Reprise of the Case of Eads v. Brazleton,* 44 Ark. L. Rev. 425 (1991); Fry, *The Treasure Below: Jurisdiction Over Salving Operations in International Waters,* 88 Colum. L. Rev. 863 (1988) (student note); Horrell, *Telepossession Is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery,* 3 Pace Y.B. Int'l. L. 309 (1991) (student note); King, *Admiralty Law: Evolving Legal Treatment of Property Claims to Shipwrecks in International Waters,* 31 Harv. Int'l. L. J. 313 (1990) (student note).

[14] The trade journal of the coin industry, for example, stated that "the ship's cargo is going to totally change several vital segments of numismatics at a single stroke, and will certainly make every reference book and catalog of California Territorial and private gold issues obsolete." *Shipwreck Yields Lost Shipment,* Numismatic News, Oct. 3, 1989. The determination whether the entire cargo will remain intact and under the control of Columbus-America, or will instead be the subject of a salvage sale, can have a significant impact on the cargo's value.

> nological developments have made possible a new type of "salvage" presenting different and more complex legal issues than traditional maritime salvage—the recovery of treasure and artifacts from ancient shipwrecks. The courts have had difficulties in such cases, primarily because the issues presented cut across many different areas of law: admiralty, the law of the sea, the law of "finds," sovereign immunity, and land and property rights under federal and state law. The cases are in conflict on several points. . . .

T. Schoenbaum, *supra*, § 15-7 (citing numerous cases discussed in this petition). Approximately 50,000 shipwrecks are located within the navigable waters of the United States, and many have historical and other significance. H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 1, *reprinted in* 1988 U.S.C.A.N. 365. The number of wrecks outside these boundaries (but nonetheless within the admiralty jurisdiction of 28 U.S.C. § 1333), such as the CENTRAL AMERICA, is even greater. The important effects of this legal confusion can only grow.

B. The Opinion Below Chills Ocean Exploration and Burdens Admiralty Courts that Must Adjudicate Rights in Long-lost Vessels

Although the Federal Government's public policy strongly encourages deep sea exploration, such exploration is fraught with risks. Exploration of the seabed requires highly complex and sophisticated technologies, and failures can occur at any stage of the exploration process. Enormous sums of venture capital are required if private enterprises, in addition to governments, are to have the opportunity to participate in such exploration. *See* U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation—Background Paper*, OTA-BP-E-37, 8 (1987).

Under the law of finds, risks are balanced against the certainty and predictability that title will vest in an explorer who succeeds in locating and possessing ancient artifacts on the seabed. The opinion below, however, pro-

vides an open invitation to highly speculative and fabricated claims. As this case illustrates, only after incurring the risks and expense of bringing articles to the surface will finders know how many purported claimants might appear.[15] The temptation for fraud and puffed-up claims is particularly acute as to long-lost treasure, where substantial sums are at stake.[16] Without this Court's attention, legal uncertainty and the resulting threat of litigation over ownership will make the formation of sea exploration ventures far more difficult and new discoveries less likely.

The approach of the opinion below also burdens admiralty courts with the difficult task of dividing treasure based on claims given ageless vitality by its rule against abandonment, but whose validity or size is not evidenced by documentation. As the dissent below put it:

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[15] For this reason, the court of appeals' rule provides maritime explorers with an unfortunate disincentive to perform recovery in an archaeologically responsible manner. Through the use of new and sophisticated marine technologies, shipwrecks can yield information not only from their cargoes, but also from their structures and the utensils, plates, glassware, cutlery and clothing found aboard historic shipwrecks. Giesecke, *Shipwrecks: The Past in the Present*, 15 Coastal Management 179, 180 (1987). Ironically, under the Fourth Circuit's approach, if a finder develops historical information linking an artifact to a specific crew member, cargo owner or passenger, the fruit of its discovery may only be a claim of ownership that had been stale for many generations.

[16] The lengths to which some will go when valuable artifacts are at stake are illustrated in this very case by the claims asserted by the Superintendent of Insurance of the State of New York, who purports to represent nine companies that had been liquidated and their affairs wound up in the late nineteenth century. Until the court of appeals' decision, there would have been scant legal basis for any entity that had itself *ceased to exist* a century ago to claim that it retained a legitimate interest in the CENTRAL AMERICA shipwreck. Without this Court's attention, scavenging of long-lost claims by enterprising counsel may become a more profitable industry than salvaging of long-lost shipwrecks by entrepreneurial explorers. *Cf. To Hunt Treasure, Slip into a Lawsuit*, U.S. News and World Report, Apr. 16, 1990.

> On remand, the district court will be faced with the difficult, if not impossible, task of determining which claims were paid by the insurance companies and in what amounts. This problem is caused by the insurance companies' failure to maintain the records necessary to establish their claims. Had the insurance companies not abandoned their claims they surely would have maintained the records necessary to establish their amount.

Pet. App. 49a. Application of the law of finds and the associated presumption of abandonment for long-lost wrecks would achieve certainty and finality in the law by disfavoring purported owners' claims that are not supported by reliable evidence. The opinion below, in contrast, leaves admiralty courts in future cases with a "Herculean task." *Id.*

C. The Court of Appeals' Approach to Abandonment Will Spawn Confusion in the Law Governing Public Administration of Historic Shipwrecks

The uncertainty over legal requirements for abandonment that arises from the opinion below has important implications for the law governing management of maritime resources by the Federal Government and the States. Technological advances have made access to shipwrecks easier, creating greater interest in them, but at the same time placing them at risk of destruction. *See* H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 1, *reprinted in* 1988 U.S.C.C.A.N. 365. Congress and the States have accordingly passed legislation aimed at protecting these historical and archaeological resources. To the extent the coverage of these statutes is defined by reference to "abandoned" shipwrecks, however, the resurrection of ancient private claims sanctioned by the court of appeals places them in doubt.

The major federal statute on point is the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101-2106 ("ASA"). Under the ASA, the United States asserted title to "any

abandoned shipwreck" that is on or embedded in the lands or coralline formations of a State, but transferred title of most such shipwrecks to the State on whose submerged lands they are located. 43 U.S.C. § 2105. States are encouraged under the ASA to take steps to protect valuable abandoned shipwrecks for recreational and historical purposes. 43 U.S.C. § 2104. The text of the ASA, however, contains no definition of the term "abandoned." Accordingly, the statute must be assumed to have used abandonment as judicially defined in admiralty law. *See, e.g., Evans v. United States*, 112 S. Ct. 1881, 1885 (1992) (citing Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). The legislative history of the ASA confirms that the general maritime law meaning was incorporated:

> The Committee notes that the term "abandoned" does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 1, 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 366.

Under the court of appeals opinion, this is no longer the meaning of the term "abandoned" under the common law of admiralty. Absent an express abandonment, the ownership claim of anyone who appears to assert an interest is instead preserved, and the wreck is not considered abandoned. Pet. App. 21a. The definition of abandonment in the opinion below therefore has the potential of removing from the coverage of the ASA's protection any number of shipwrecks that would previously have been considered abandoned. Many states have statutes similarly aimed at protecting historic shipwrecks, most of which define their coverage in terms of abandonment. *See* H.R. Rep. No. 514(I) at 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 366 (listing statutes). Accordingly,

the definition of "abandonment" implicates substantial state and federal interests, resources, and potential liabilities, as well as the recognition of federalism embodied in the ASA's grant of authority over shipwrecks to the States. The Court's attention to the issue is warranted now to avoid further confusion in the area.

CONCLUSION

The writ of certiorari should be granted.

Repectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 90-2730 to 90-2732

COLUMBUS-AMERICA DISCOVERY GROUP,
Plaintiff-Appellee,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; HARRY G. JOHN; JACK F. GRIMM,
Plaintiffs,

v.

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,
Claimants-Appellants,

and

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 33 minutes North Latitude; Western Boundary —77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes West Longitude, (believed to be the S.S. Central America), *in rem,*
Defendant,

CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT-DOHERTY GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

Claimants.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS; THE BOARD OF UNDERWRITERS OF NEW YORK,

Amici Curiae.

HARRY G. JOHN; JACK F. GRIMM,

Plaintiffs-Appellants,

COLUMBUS-AMERICA DISCOVERY GROUP,

Plaintiff-Appellee,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Plaintiff,

v.

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT-DOHERTY GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

Claimants,

v.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 33 minutes North Latitude; Western Boundary —77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes West Longitude, (believed to be the S.S. Central America), *in rem*,

Defendant,

AMERICAN INSTITUTE OF MARINE UNDERWRITERS; THE BOARD OF UNDERWRITERS OF NEW YORK,

Amici Curiae.

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Plaintiff-Appellant,

COLUMBUS-AMERICA DISCOVERY GROUP,

Plaintiff-Appellee,

and

HARRY G. JOHN; JACK F. GRIMM,

Plaintiffs,

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK; CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE;

INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT-DOHERTY GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

Claimants,

v.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 33 minutes North Latitude; Western Boundary —77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes West Longitude, (believed to be the S.S. Central America), *in rem,*

Defendant.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS; THE BOARD OF UNDERWRITERS OF NEW YORK,

Amici Curiae.

Argued June 5, 1991

Decided Aug. 26, 1992

Douglas A. Jacobsen, Bigham, Englar, Jones & Houston, John H. Reilly, Jr., Dickerson & Reilly, Edward A. Friedman, Friedman & Kaplan, New York City, Guilford D. Ware, Crenshaw, Ware & Martin, Norfolk, Va., argued (Marilyn L. Lytle, George R. Daly, Bigham, Englar, Jones & Houston, Robert D. Kaplan, Friedman & Kaplan, New York City, James L. Chapman, IV, Crenshaw, Ware & Martin, Norfolk, Va., Daniel R. Warman, John Y. Richardson, Jr., Williams, Worrell, Kelly, Greer & Frank, Norfolk, Va., on brief), for appellants.

Richard T. Robol, Hunton & Williams, Norfolk, Va., Robert W. Trafford, Porter, Wright, Morris & Arthur, Columbus, Ohio, argued (Kevin J. Cosgrove, Robert M. Tata, Stephen W. Haynie, Hunton & Williams, Norfolk, Va., Curtis A. Loveland, William J. Kelly, Jr., Daniel F. Gourash, Porter, Wright, Morris & Arthur, Columbus, Ohio, on brief), for appellee.

Allan S. Reynolds, Reynolds, Smith & Winters, Norfolk, Va., for amici curiae.

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

OPINION

DONALD RUSSELL, Circuit Judge:

"When Erasmus mused that '[a] common shipwreck is a source of consolation to all', *Adagia*, IV.iii.9 (1508), he quite likely did not foresee inconcinnate free-for-alls among self-styled salvors." *Martha's Vineyard Scuba HQ, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1061 (1st Cir.1987). Without doubt the Dutch scholar also could not imagine legal brawls involving self-styled "finders" from Ohio, British and American insurance underwriters, an heir to the Miller Brewing fortune, a Texas oil millionaire, an Ivy League university, and an Order of Catholic monks. Yet that is what this case involves, with the prize being up to one billion dollars in gold.

This gold was deposited on the ocean floor, 8,000 feet below the surface and 160 miles off the South Carolina coast, when the S.S. CENTRAL AMERICA sank in a hurricane on September 12, 1857. The precise whereabouts of the wreck remained unknown until 1988, when it was located by the Columbus-America Discovery Group ("Columbus-America"). This enterprise has since been recovering the gold, and last year it moved in federal district court to have itself declared the owner of the treasure. Into court to oppose this manoeuvre came British and American insurers who had originally underwritten the gold for its ocean voyage and then had to pay off over a million dollars in claims upon the disaster. Also attempting to get into the stew were three would-be intervenors who claimed that Columbus-America had used their computerized "treasure map" to locate the gold. The district court allowed the intervention, but it did not give the intervenors any time for discovery.

After a ten-day trial, the lower Court awarded Columbus-America the golden treasure in its entirety, 742 F.Supp. 1327. It found that the underwriters had previously abandoned their ownership interests in the gold by deliberately destroying certain documentation. As for the intervenors, the Court held that there was no evidence showing that Columbus-America used their information in any way in locating the wreck.

Upon appeal, we find that the evidence was not sufficient to show that the underwriters affirmatively abandoned their interests in the gold. We also hold that once intervention was allowed, the district court abused its discretion by not affording the intervenors sufficient time for discovery. We therefore reverse the decision below and remand the case for further proceedings.

I.

A.

The year 1857 is justly famous in American history for its many notable events. Among these was the beginning

of a fairly serious financial decline, the aptly named Panic of 1857. Associated with the Panic, and another reason why the year is so famous, is one of the worst disasters in American maritime history, the sinking of the S.S. CENTRAL AMERICA.

The CENTRAL AMERICA was a black-hulled, coal-fired, three-decked, three-masted sidewheeler with a cruising speed of eleven knots. Built in 1852, and launched the following year, she carried passengers, mail, and cargo between Aspinwall, Columbia (on the eastern end of the isthmus of Panama), and New York City, with a stopover in Havana. Most, if not all, of her passengers were headed to or from California, the route being one leg of the then quickest way between the west coast and the eastern seaboard—from California to the western end of the isthmus of Panama aboard a steamship, across the isthmus on the Panama Railroad, and then from Aspinwall to New York aboard another steamship. Owned by the U.S. Mail and Steamship Company and originally named the S.S. GEORGE LAW (until June 1857), the CENTRAL AMERICA completed forty-three voyages between Panama and New York in her four years of operation. During this period, the California gold rush was in full swing, and it has been said that the ship carried one-third of all gold shipped at that time from California to New York.

In August of 1857, over four hundred passengers and approximately $1,600,000 (1857 value) in gold (exclusive of passenger gold) left San Francisco for Panama aboard the S.S. SONORA. Many of the passengers were prospectors who had become rich and were returning home, either for good or to visit. Also on board were California Judge Alonzo Castle Monson, who resigned from the bench after losing his house and all his money in a famous poker game, and Mrs. Virginia Birch, a.k.a. "the notorious Jenny French," a former dance hall girl well known in San Francisco. As for the gold, it was being

shipped by California merchants, bankers, and express companies, including Levi Straus and Wells Fargo, to New York banks, the banks wanting specie to stave off the effects of the financial downturn.

The travellers and the cargo reached Panama without incident, and they crossed the isthmus by rail. On September 3, over six hundred people came aboard the CENTRAL AMERICA, as well as $1,219,189 of the gold shipped on the SONORA, the remainder being shipped to England aboard a different vessel. The CENTRAL AMERICA first headed for Havana, which was reached on September 7. There, the ship lay over for a night, and some of the passengers debarked to catch another vessel for New Orleans. On September 8, under clear skies, the CENTRAL AMERICA left Havana for New York, carrying approximately 580 persons and her golden treasure.

On the second day out of Havana, the weather changed and a mighty storm came up. What the passengers and crew could not know was that they were headed directly into the teeth of a ferocious hurricane. As the storm worsened around the CENTRAL AMERICA, a leak developed and soon water was rushing into the boat. The water extinguished the fires in the ship's boilers, and this in turn caused the ship's pumping system to fail. All able male passengers began a systematic bailing of water out of the ship, but it was to no avail; after thirty frantic hours, the boiler fires would still not light and the water level continued to rise.

Knowing the situation was hopeless, Captain William Lewis Herndon managed to hail a passing ship, the brig MARINE, and one hundred persons, including all but one of the women and children aboard, were safely transfered to the other ship. Time and conditions would not allow for any more transfers, however, and shortly after 8 p.m. on September 12, the CENTRAL AMERICA began making its quick descent to the bottom of the ocean.

After being flung into the sea, many of the men managed to come to the top and float there, desperately holding onto any buoyant material available. Six to nine hours after the sinking, fifty of these men were rescued by the Norwegian bark ELLEN. Earlier, a small bird had thrice circled the ELLEN and flown directly into the face of the ship's captain. Taking this as a sign, the captain changed his course to follow from whence the bird had come, and in so doing discovered the fifty floating survivors. Three other men were also rescued when, nine days later and 450 miles away, a ship spotted their lifeboat, which had been riding the Gulf Stream.

In all, 153 persons were rescued, while approximately 425 lost their lives. Also lost were hundreds of bags of mail and the $1,219,189 in gold. At the time, there were rumors that other commercial shipments of gold were aboard, but these were quickly discounted. It is true, though, that a significant amount, probably several hundred thousand dollars worth (1857 valuation), of passenger gold was lost. Many passengers had with them their earnings from several years' labor in the California gold fields. Some kept this gold on their person, while others carried it in carpetbags or trunks. Also, passenger gold could have been checked with the ship's purser, although these records were lost with the ship. Captain Thomas W. Badger is one example of a passenger carrying gold, he having lost $17,500 of it stored in a carpetbag. Also, the newspapers reporting the disaster contained vivid accounts of men flinging down their hard earned treasure in disgust upon realizing their impending doom.

Needless to say, for the next several weeks newspapers around the country devoted much space to the disaster which befell the CENTRAL AMERICA. While people mourned the over four hundred persons who had valiantly lost their lives, they also feared that the loss of such a large amount of specie would exacerbate the coun-

try's already serious financial situation. The commercial shipments of gold had been insured, though, and the insurance underwriters began advertising in the newspapers that they would pay off their commitments upon the proper proofs being presented. Approximately one-third of the treasure had been underwritten by New York insurers while the rest was underwritten in London. Without doubt, most, if not all, of the claims were promptly paid off by the underwriters.

Under applicable law, then and now, once the underwriters paid the claims made upon them by the owners of the gold, the treasure became theirs. Thus, less than two weeks after the disaster, the underwriters began negotiating with the Boston Submarine Armor Company about possibly raising the ship and her cargo. Also, on June 28, 1858, two of the underwriters (Atlantic Mutual Insurance Company and Sun Mutual Insurance Company) contracted with Brutus de Villeroi, a Frenchman then living in Pennsylvania, to salvage the gold. The contract states that de Villeroi, "by means of his Invention of a Submarine boat" and at his own expense, would raise the treasure and receive a salvage award of seventy-five percent. At this time, though, no one was quite sure where the boat had gone down, or in how deep of water. At first, some estimated the ship was in only twenty-eight fathoms of water (168 feet), when in fact it was over 8,000 feet below the surface. As would be expected, nothing came of the salvage attempts in the late 1850s, and the issue, and the gold, would lay dormant for over a hundred and twenty years.

B.

Beginning in the 1970s, a number of individuals and groups began discussing and planning the salvage of the CENTRAL AMERICA, as the decade before had seen a great advance in the technology necessary for deep sea salvage. Still, though, no one was positive where the ship had gone down or in what depth of water. At least one

group thought they had found her in shallow water fifteen miles off Cape Hatteras, while in reality was at least one hundred miles from where she actually lay.

A number of those interested in salvaging the CENTRAL AMERICA contacted some of the various insurers who had underwritten the gold. The would-be salvors hoped to receive a relinquishment of the insurers' rights to the property, or at least form a salvage contract with the underwriters. While the underwriters negotiated with several groups about the salvage, they did not enter into any salvage contracts nor did they relinquish any of their rights to the gold.

One of the groups that contacted several of the underwriters was Plaintiff Columbus-America Discovery Group, the eventual salvor. Columbus-America asked the underwriters to convey to it any claims they might have regarding the gold, but this was not done.

Another group that was interested in salvaging the gold was Santa Fe Communications, Inc. ("Santa Fe"), whose interests are now owned by Plaintiff-Intervenors Harry G. John and Jack R. Grimm.[1] In 1984, Santa Fe paid Plaintiff-Intervenor Columbia University $300,000 for Columbia's Dr. William B.F. Ryan to conduct a sonar search over a 400 square mile area of the Atlantic Ocean. During his sonar search, Dr. Ryan identified seven "targets" on the ocean floor. Of these targets, he found only one, target #4, to be a good candidate for being the CENTRAL AMERICA. Dr. Ryan felt that "this target is almost certainly the scattered debris of a shipwreck," and his report mentioned that further exploration of it would have been made but for "gale force winds and seas." In conclusion, he told Santa Fe, "you [Harry John] and Mr. Jack Grimm have a likely candidate for further exploration." Santa Fe, though, did not further

[1] John is an heir to the Miller Brewing Company, while Grimm is a multi-millionaire Texas oilman who has in the past led searches for Noah's Ark, the Loch Ness Monster, and the TITANIC.

pursue the matter, and on December 31, 1984, it transferred to a Catholic monastic order, the Province of St. Joseph of the Capuchin Order—St. Benedict Friary of Milwaukee, Wisconsin ("the Capuchins"), any and all rights and interests arising out of its undersea salvage operations. It now appears that target #4 was indeed the CENTRAL AMERICA.

The contract between Santa Fe and Columbia provided that Columbia would be able to freely publish the results of the sonar survey, but only after keeping such results confidential for a year. Shortly after the survey, Columbus-America President Thomas Thompson began contacting Dr. Ryan and others at Columbia and Santa Fe in an attempt to learn the results. Over a two-year period, Thompson and Dr. Ryan had a number of conversations about the techniques for identifying sonar images on the ocean floor, but the latter only believed that Thompson, who was associated with the prestigious Battelle Memorial Institute, was interested in this information from a scientific standpoint.

On February 12, 1986, Thompson wrote Dr. Ryan and requested certain sonar photographs taken during the survey. The letter also stated, "I am submitting this order primarily out of personal interest. I have a personal source of funds available for data collection and correlation-type work. I am also interested in the techniques for separating anomalies from their environment and in the processing of specific anomalies to determine their character." Dr. Ryan passed along Thompson's request to Columbia, which agreed to provide the information. As a condition, though, Columbia told Thompson that "since the data you requested is not in the public domain, we would require your agreement that any photo-copied records or computer tapes you receive would be for your sole use and would not be reproduced for others." Thompson agreed to this condition, but went ahead and placed the information he received into Columbus-America's files.

C.

In 1987, after much effort and expense, Columbus-America believed it had found the CENTRAL AMERICA. Thus, on May 27, 1987, it filed, in the United States District Court for the Eastern District of Virginia, an *in rem* action against the wreck, alleging that, under the law of finds, it was its "finder," or, alternatively, under the law of salvage, its "salvor." Columbus-America then asked for and received, on July 17, 1987, a preliminary injunction enjoining the other would-be salvors from operating within a specified area ("injunction box #1") of the sea. Injunction box #1 covered an area which was approximately thirty miles from Dr. Ryan's target #4.

After receiving this injunction, Columbus-America spent two years attempting to salvage the wreck they thought was the CENTRAL AMERICA—this time was also spent battling the other would-be salvors in court. Plaintiffs recovered several artifacts, as well as a good many lumps of coal, but at some point they recognized that they were salvaging the wrong ship. They then began to look at other likely targets, and, eventually, they discovered the right ship. Thus, Columbus-America requested the Court to grant them, by permanent injunction, exclusive control over the area around this new find, and this was done through an Order entered on August 18, 1989 ("injunction box #2"). Within the area of injunction box #2 was Dr. Ryan's target #4.

Since 1989, Columbus-America, through its invention of a submersible robot which can pick up objects ranging from small gold coins to a ship's anchor weighing thousands of pounds, has been salvaging objects left on the ocean floor by the CENTRAL AMERICA. Undoubtedly, its major interest is in recovering the gold, and so far several hundred million dollars worth (present value) of gold coins, ingots, and bars have been recovered—it is estimated that the total haul may be worth up to one billion dollars.

On September 29, 1989, many of the original underwriters of the gold, plus the Superintendent of Insurance of the State of New York for several insurance companies now defunct, filed claims with the district court asserting that they were the proper owners of the gold. After this, extensive discovery was had, and the case was scheduled for trial beginning April 3, 1990.

Three days before trial, John and Grimm moved to intervene, as did Columbia two days later. The intervenors claimed that Columbus-America must have used the information from Dr. Ryan's sonar survey in locating the CENTRAL AMERICA, and thus they wished for a percentage of the recovery. Two weeks earlier, John had bought back for $10 any claims the Capuchins would have on the CENTRAL AMERICA. When Santa Fe had originally donated their rights to the monks in 1984, the Capuchins recognized the gift as worthless, and John did nothing to enlighten them on the discovery of the ship or the upcoming trial. After later realizing what John was up to, though, the monks must have protested, for on April 10 both John and Grimm signed an agreement with the Capuchins giving the Order one-third of any judgment they (John or Grimm) would recover.

The district court allowed John, Grimm, and Columbia to intervene, but it permitted them no discovery—the Court wanting the trial to begin as scheduled. Earlier, the Court had bifurcated the trial, so that the first part would concern only whether Columbus-America was entitled to finder or salvor status. If the district court found that the insurance companies had somehow abandoned the gold, Columbus-America would be considered its "finder," and thus its owner. On the other hand, if the underwriters had not abandoned the gold, they would still remain its owners and Columbus-America would be its "salvor." If the latter scenario were found to be true, a second phase of the trial would be necessary, wherein the Court would have to determine what each underwriter had insured and the amount of Columbus-

America's salvage award. Because the trial had been bifurcated, the intervenors wanted their claims adjudicated after the finder/salvor issue was decided. The Court, though, would allow intervention only if the would-be intervenors agreed to have their claims adjudicated at the same time as the finder/salvor issue—that is, beginning the next day.

The trial began on schedule, lasted ten days, and received much national attention. Over its course, many witnesses appeared and hundreds of exhibits were entered into evidence. The parties then began an anxious wait for a decision.

On August 14, 1990, the Court found for Columbus-America on all the issues, dismissing the claims of the underwriters, Columbia, John, and Grimm. *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F.Supp. 1327 (E.D. Va.1990). On the finder/salvor issue, the district court held that the underwriters had abandoned the gold, and thus Columbus-America was its finder and sole owner. The Court based this finding of abandonment primarily on the supposed fact that the underwriters had *intentionally* destroyed any documentation they had once had concerning the case. *Id.* at 1344-48. As for the intervenors, the Court found that they failed to prove that the information furnished Thompson could have assisted in locating the ship, that Columbus-America used this information in anyway, or "even if the information was of value and was used, that any such use would entitle them to share in any recovery." *Id.* at 1341.

The underwriters and the intervenors now appeal.

II.

A.

Historically, courts have applied the maritime law of salvage when ships or their cargo have been recovered from the bottom of the sea by those other than their

owners. Under this law, the original owners still retain their ownership interests in such property, although the salvors are entitled to a very liberal salvage award. Such awards often exceed the value of the services rendered, and if no owner should come forward to claim the property, the salvor is normally awarded its total value. On salvage generally, see 3A M. Norris, *Benedict on Admiralty: The Law of Salvage* (7th ed. rev. 1991).

A related legal doctrine is the common law of finds, which expresses "the ancient and honorable principle of 'finders, keepers.'" *Martha's Vineyard*, 833 F.2d at 1065. Traditionally, the law of finds was applied only to maritime property which had never been owned by anybody, such as ambergris, whales, and fish. 3A *Benedict on Admiralty* § 158, at 11-15. A relatively recent trend in the law, though, has seen the law of finds applied to long lost and abandoned shipwrecks. *Id.* § 158, at 11-16 to 11-18.

Courts in admiralty favor applying salvage law rather than the law of finds. As has been succinctly stated by Judge Abraham D. Sofaer:

> The law of finds is disfavored in admiralty because of its aims, its assumptions, and its rules. The primary concern of the law of finds is title. The law of finds defines the circumstances under which a party may be said to have acquired title to ownerless property. Its application necessarily assumes that the property involved either was never owned or was abandoned. . . . To justify an award of title (albeit of one that is defeasible), the law of finds requires a finder to demonstrate not only the intent to acquire the property involved, but also possession of that property, that is, a high degree of control over it.
>
> These rules encourage certain types of conduct and discourage others. A would-be finder should be expected to act acquisitively, to express a will to own by acts designed to establish the high degree of control required for a finding of possession. The would-

> be finder's longing to acquire is exacerbated by the prospect of being found to have failed to establish title. If either intent or possession is found lacking, the would-be finder receives nothing; neither effort alone nor acquisition unaccompanied by the required intent is rewarded. . . . Furthermore, success as a finder is measured solely in terms of obtaining possession of specific property; possession of specific property can seldom be shared, and mere contribution by one party to another's successful efforts to obtain possession earns no compensation.
>
> Would-be finders are encouraged by these rules to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or other would-be finders that could entirely deprive them of the property.

Hener v. United States, 525 F.Supp. 350, 356 (S.D.N.Y. 1981).

In sharp contrast to "the harsh, primitive, and inflexible nature of the law of finds" is the law of salvage.

> Admiralty favors the law of salvage over the law of finds because salvage law's aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less competitive and secretive forms of conduct than finds law. The primary concern of salvage law is the preservation of property on oceans and waterways. Salvage law specifies the circumstances under which a party may be said to have acquired, not title, but the right to take possession of property (e.g., vessels, equipment, and cargo) for the purpose of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid.
>
> Salvage Law assumes that the property being salved is owned by another, and thus that it has not been abandoned. Admiralty courts have adhered to

> the traditional and realistic premise that property previously owned but lost at sea has been taken involuntarily out of the owner's possession and control by the forces of nature at work in oceans and waterways; in fact, property may not be "salvaged" under admiralty law unless it is in some form of peril. . . .
>
> Salvage law requires that to be a salvor a party must have the intention and the capacity to save the property involved, but the party need not have the intention to acquire it. Furthermore, although the law of salvage, like the law of finds, requires a salvor to establish possession over property before obtaining the right to exclude others, "possession" means something less in salvage law than in finds law. In the salvage context, only the right to compensation for service, not the right to title, usually results; "possession" is therefore more readily found than under the law of finds. . . . Moreover, unlike the would-be finder, who is either a keeper or a loser, the salvor receives a payment, depending on the value of the service rendered, that may go beyond quantum meruit. Admiralty's equitable power to make an award for salvage—recognized since ancient times in maritime civilizations—is a corollary to the assumption of nonabandonment and has been applied irrespective of the owner's express refusal to accept such service. . . .
>
> These salvage rules markedly diminish the incentive for salvors to act secretly, to hide their recoveries, or to ward off competition from other would-be salvors. . . . In short, although salvage law cannot alter human nature, its application enables courts to encourage open, lawful, and cooperative conduct, all in the cause of preserving property (and life).

Id. at 357-58; *see also* 3A *Benedict on Admiralty* § 158, at 11-15 to 11-16.

Today, finds law is applied to previously owned sunken property only when that property has been abandoned by its previous owners. Abandonment in this sense means much more than merely leaving the property, for it has long been the law that "[w]hen articles are lost at sea the title of the owner in them remains." *THE AKABA*, 54 F. 197, 200 (4th Cir. 1893); *see also* 3A *Benedict on Admiralty* § 158, at 11-1 to 11-2; *Hener*, 525 F.Supp. at 357; *Wilkie, et al. v. Two Hundred and Five Boxes of Sugar*, 29 F.Cas. 1247 (D.S.C. 1796) (No. 17,662). Once an article has been lost at sea, "lapse of time and nonuser are not sufficient, in and of themselves, to constitute an abandonment." *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F.Supp. 452, 456 (E.D. Va. 1960); *see also Wilkie*, 29 F.Cas. at 1247 (length of time does not divest an original owner of his derelict property at sea). In addition, there is no abandonment when one discovers sunken property and then, even after extensive efforts, is unable to locate its owner. *Weber Marine, Inc. v. One Large Cast Steel Stockless Anchor and Four Shots of Anchor Chain*, 478 F.Supp. 973, 975 (E.D.La. 1979).

While abandonment has been simply described as "the act of deserting property without hope of recovery or intention of returning to it," *Nunley v. M/V DAUNTLESS COLOCOTRONIS*, 863 F.2d 1190, 1198 (5th Cir. 1989), in the lost property at sea context, there is also a strong *actus* element required to prove the necessary intent. *Zych v. The Unidentified, Wrecked and Abandoned Vessel*, 755 F.Supp. 213, 214 (N.D.Ill. 1990); *THE NO. 105*, 97 F.2d 425, 426 (5th Cir. 1938). "Abandonment is said to be a voluntary act which must be proved by a clear and unmistakable affirmative act to indicate a purpose to repudiate ownership." *THE PORT HUNTER*, 6 F.Supp. 1009, 1011 (D.Mass. 1934). The proof that need be shown must be "strong . . ., such as the owner's express declaration abandoning title." T. Schoenbaum, *Admiralty and Maritime Law* § 15-7, at 512 (1987); *Hener*, 525

F.Supp. at 357; 3A *Benedict on Admiralty* § 158, at 11-16; *see also Brady v. The Steamship AFRICAN QUEEN*, 179 F.Supp. 321, 324 (E.D.Va. 1960) (the law of finds should be applied only in "extreme cases where the property is wholly derelict and affirmatively abandoned by the owners and the underwriters"); and *Zych*, 755 F.Supp. at 214 ("A finding of abandonment must be supported by strong and convincing evidence").

There are only a handful of cases which have applied the law of finds, all of which fit into two categories. First, there are cases where owners have expressly and publicly abandoned their property. *See, e.g., Nunley*, 863 F.2d at 1199; *State ex rel. Ervin v. Massachusetts Co.*, 95 So.2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881, 78 S.Ct. 147, 2 L.Ed.2d 112 (1957); *Nippon Shosen Kaisha, K.K. v. United States*, 238 F.Supp. 55 (N.D.Cal. 1964); *Brady*, 179 F.Supp. at 322. In the second type of case, items are recovered from ancient shipwrecks and no owner appears in court to claim them. Such circumstances may give rise to an inference of abandonment, but should an owner appear in court and there be no evidence of an express abandonment, the law of salvage must be applied. We agree with the author of *Admiralty and Maritime Law* that:

> In the treasure salvage cases, often involving wrecks hundreds of years old, the inference of abandonment may arise from lapse of time and nonuse of the property, or there may even be an express disclaimer of ownership. This calls for the application of the law of finds. By contrast, parties who intend to assert a claim of ownership may be identified. In such a case the law of salvage is applied.

§ 15-7, at 514 (footnotes omitted); *see also Hatteras, Inc. v. THE U.S.S. HATTERAS*, 1984 A.M.C. 1094, 1097 n. 5 (S.D.Tex. 1981) ("While mere nonuse of property and lapse of time without more do not establish abandonment, they may, under circumstances where the owner has other-

wise failed to act or assert any claim to property, support an inference of intent to abandon").

The case below appears to be the only reported decision involving salvaged treasure from ancient shipwrecks wherein a court has applied the law of finds despite the fact that the previous owner appeared in court. In all other finds law cases, no prior owner has appeared. One example is the *Treasure Salvors* set of cases, all of which involved the salvage of Spanish treasure ships sunk off the Florida Keys in 1622. Widely quoted is the Fifth Circuit's phrase that "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978). Yet the Court there also took the trouble to note that it had been stipulated by all parties involved that the original owners had abandoned the wrecks, and the district court also made mention of the fact that, "The modern day government of Spain has expressed no interest in filing a claim in this litigation as a successor-owner." *Id.* at 336 n. 9; *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 556 F.Supp. 1319, 1334 n. 2 (S.D.Fla. 1983). Another Spanish wreck, this time from the 1715 Plate Fleet, was involved in *Cobb Coin Co., Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F.Supp. 186 (S.D.Fla. 1981), and there the Spanish government again made no claim of ownership.

In *Martha's Vineyard, supra*, which concerned the salvage of the S.S. REPUBLIC, a ship that "plummeted to a watery grave in 1909," the First Circuit made it a point to state that, "After petitioner brought its action *in rem* in the district court, no person or firm appeared to assert any overall claim of ownership." 833 F.2d at 1065. Likewise *Massachusetts v. Maritime Underwater Surveys, Inc.*, 403 Mass. 501, 531 N.E.2d 549 (1988), which involved

salvage of "the notorious pirate ship WHYDAH," a vessel that sank in a storm off Cape Cod in April of 1717. There, the Supreme Judicial Court of Massachusetts noted that "American courts have applied the law of finds, rather than the law of salvage, in cases involving ancient shipwrecks where no owner is likely to come forward," *id.* 531 N.E.2d at 551, apparently after descendants of the illfated pirates made no attempt to rush into court and claim the booty.[2]

An example of a treasure salvage case where the original owner, or its successor in interest,[3] appeared and salvage law was applied is *Zych, supra.* In this case, the LADY ELGIN sank in 1860 on Lake Michigan, and claims were paid on the vessel and its cargo by Aetna Insurance Company. Because of the recent advances in technology necessary for deep water salvage, an independent salvor located the ship in the late 1980s and he, claiming finder status, attempted to have the district court declare him the owner. This claim was disputed by the Lady Elgin

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[2] The other reported cases where no owner appeared and the law of finds was applied are *Klein v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985) (Eighteenth Century English vessel); *Wiggins, supra*, (Norwegian bark carrying Italian marble which sank in 1894, *Rickard v. Pringle*, 293 F.Supp. 981 (E.D.N.Y. 1968) (propeller from a 1902 shipwreck); *Chance v. Certain Artifacts Found and Salvaged From the NASHVILLE a/k/a the RATTLESNAKE*, 606 F.Supp. 801 (S.D.Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985) (privately owned Confederate pirate ship sunk in 1863); and *Indian River Recovery Co. v. THE CHINA*, 645 F.Supp. 141 (D.Del. 1986) (Nineteenth Century vessel).

[3] Throughout our case, Columbus-America has made numerous mentions of the fact that the insurance underwriters are not the "original" owners of the gold, but rather assumed their ownership interests through subrogation. While Columbus-America appears to want the insurers to possess only some type of second-class ownership interest in the gold, this is clearly not the law. Absent abandonment, insurance underwriters, or even those to whom the underwriters assign their interests—see, e.g., *Zych, supra*—retain the same interests as the "original" owners.

Foundation, to which Aetna's successor, CIGNA, had transferred its ownership interests in the wreck in April of 1990. The court, after noting "the law's hesitancy to find abandonment and the concomitant requirement that abandonment be supported by strong and convincing evidence," found that the vessel had not been abandoned. Aetna's successor in interest, the Lady Elgin Foundation, still retained its ownership interest, and the law of salvage, not finds, was applied. As for the 130 years during which no salvage was attempted, the court found that "Aetna was not required to engage in efforts to recover the wreck in order to avoid abandoning its interest when such efforts would have had minimal chances for success." 755 F.Supp. at 216.

In maintaining the position that previous owners can abandon sunken vessels even without any affirmative acts, Columbus-America relies especially on two state supreme court cases decided before the Civil War, *Eads v. Brazelton*, 22 Ark. 499 (1861) and *Wyman v. Hurlburt*, 12 Ohio 81 (1843). *Eads* involved the steamboat AMERICA which partially sank in the Mississippi River in 1827. The boat contained much valuable property, and in the two weeks after its sinking the owners conducted salvage operations in which they rescued all of the fur and government-owned specie on board, as well as one-half of the six hundred pigs of lead and a portion of the shot. Also, all of the machinery of the ship, including the boilers, was successfully removed. After this salvage, the owners physically abandoned the wreck and two years later an island began forming about it, on which trees would eventually grow to a height of thirty or forty feet.

The actual case concerned which of two would-be finders/salvors owned the remaining pigs of lead. As for the original owners, the Court declared that the cargo had been abandoned and then, in dicta, noted that "in extreme cases property wholly derelict and abandoned has been held to belong to the finder against the former owner." *Id.* at 509. Such was not the case here, though, for the

former owners made no attempt to claim an ownership interest in the lead.[4] Because the boat and its contents were partially salvaged shortly after the wreck, the remaining cargo was easily salvageable for at least two years thereafter, and, most importantly, the original owners made no claim to the property once the remaining lead was salvaged, we find *Eads* inapposite.

The facts of *Wyman* are more on point, although we doubt its precedential value. There, a schooner, THE G.S. WILLIS, sank in Lake Erie during the fall of 1835. The next year it was raised by another party and $865 in specie was discovered in the cabin. Truman Wyman, the original owner of this money, then filed an action of trover in Ohio state court against the finders/salvors. The case was tried before a jury in the Supreme Court of Ashtabula County, and they returned a special verdict which included the finding that "at the time the said schooner was seized by the defendants, the same was abandoned by the plaintiff, and that said schooner was, on the day and year aforesaid, derelict property, and when found in the bottom of the Lake was worth nothing." 12 Ohio at 85.

A majority of the Ohio Supreme Court held for the finders/salvors, awarding them the entire amount. The Court based this decision on the jury's finding of abandonment, which the majority supposed was intended "to be understood that all hope, expectation, and intention to recover the property were utterly and entirely relinquished." *Id.* at 86-87. A seventy-two word dissenting opinion was filed, though, by Chief Justice Ebenezer Lane. Lane was "not entirely certain that [his brethren] adopt[ed] the true sense of the word 'abandoned,' [as it was employed] in the special verdict." Instead, the Chief Justice was "incline[d] to think the jury meant nothing

[4] In fact, the only person originally connected with THE AMERICA who was mentioned by the Court, its Captain, Swan, far from claiming any ownership interest in the boat, actually supplied information to one of the salvors as to the location of the wreck.

more than a want of the plaintiff's pursuing active measures to reclaim his property, and not a positive relinquishment of his right. If this be the true meaning, it would change the judgment." *Id.* at 88.

Because of the meager information supplied by the court, it is impossible to know which of Wyman's acts, or omissions, the jury relied on in finding an abandonment. Also, like Chief Justice Lane, we find it difficult to know exactly what the jury meant when it found the ship to have been "abandoned." What is clear, though, is that the Chief Justice was entirely correct when he stated that an abandonment of sunken cargo so as to lose possession must be shown not by the mere cessation of attempts to recover, but by the owner's positive relinquishment of his rights in the property. We find that this is the only principle of note to be gleaned from *Wyman*.[5]

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[5] Columbus-America aslo cites two other cases for the proposition that mere nonuse and lapse of time can lead to an abandonment, but neither of these cases lends any support to this argument.

In *Howard v. Sharlin*, 61 So.2d 181 (Fla. 1952), the Supreme Court of Florida wrote an extraordinarily cryptic opinion from which it is difficult to ascertain any legal principle. Supposedly the plaintiff claimed an ownership interest in a derelict vessel, the schooner GENESSEE. It is not clear, though, how the vessel became derelict, where it was located, or under what circumstances the plaintiff obtained his supposed interest. The defendant, who had apparently salvaged the lead keel of the ship, claimed in reply that the plaintiff did not possess title or, alternatively, that the vessel had been abandoned. The Court laconically settled the issues by stating:

> The testimony on the issues was voluminous, and no useful purpose would be served in here relating it. From our examination thereof, we have concluded that, regardless of the status of plaintiff's title, the evidence showed conclusively that there was an abandonment of the vessel "Genessee" and that she was a derelict at the time the defendant undertook to salvage the lead from her keel.

Id. at 181.

If it is possible, the other case, *Steinbraker v. Crouse*, 169 Md. 453, 182 A. 448 (1936), lends even less support to Columbus-America's proposition. There, the Western Marine & Salvage Com-

In conclusion, when sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds. Finds law should be applied, however, in situations where the previous owners are found to have abandoned their property. Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and longlost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest; in such a case the normal presumptions would apply and an abandonment would have to be proved by strong and convincing evidence.

B.

Before addressing whether the district court correctly found that the insured shipments of gold were abandoned

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pany ("Western Marine") in 1923 purchased 232 vessels which had formerly been federal government property. Western Marine stripped the vessels of all easily removable metal and then towed 169 of the hulls into Mallow's Bay, Charles County, Maryland. The hulls were then burned to the water's edge, after which they were pulled close to the shore so that metal salvaging could continue. Around March of 1931, though, Western Marine ceased its salvaging efforts and departed from the area, leaving behind only a security guard to look after its salvaging equipment on land. The next year, Western Marine sold both the land surrounding the wrecks and its equipment. After formal salvaging efforts had ceased, many local citizens began diving into Mallow's Bay to recover scrap metal from the wrecks. This continued openly for over two years, and although hundreds of tons of metal were removed and sold, Western Marine did nothing to stop the salvors nor did they demand any compensation. The price of metal began to rise, though, in 1934, and late that year Harry Steinbraker, a scrap dealer, contacted Western Marine and purchased its rights to the metal. Steinbraker then sought to enjoin the local salvors from their work, but the Maryland Supreme Court found that Western Marine had abandoned the hulls. Of course, it is foolhardy to attempt comparison between these facts and those in which a ship is involuntarily lost upon the high seas and salvage is not humanly possible for at least 125 years.

by the underwriters, several points should be noted. First, the CENTRAL AMERICA herself was self-insured, and successors in interest to the U.S. Mail and Steamship Company have made no attempt to claim an ownership interest in the wreck. Also, there appears to have been a fairly significant amount of passenger gold aboard, but this case, almost surprisingly, has failed to see descendants of any of the passengers attempt to gain a share of the treasure. Thus, an abandonment may be found, and Columbus-America may be declared the finder and sole owner, as to any recovered parts of the ship, all passenger possessions, and any cargo besides the insured shipments.[6]

As for the insured gold, to *prima facially* prove their ownership interests at trial, the underwriters produced several original documents: entries from the Atlantic Mutual's Vessel Disasters Book concerning the disaster (one of which contained the scribbled notation, "e[stimated] l[oss] $150,000"); records of Board resolutions to pay claims; minutes from an underwriters' board meeting discussing the CENTRAL AMERICA; a study prepared by the New York Board of Underwriters regarding the disaster; and the salvage contract between the underwriters and Brutus de Villeroi. The insurers also produced a great many period newspaper articles. These discussed the amount of treasure on board; the insurers of this treasure and the amounts they insured; the willingness of the insurers to pay off claims; the general satisfaction the insureds received from having their claims promptly settled; and the salvage negotiations between the underwriters and the Boston Submarine Armor Company.

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[6] Should Columbus-America be able to prove, for example from a location on the ocean floor inconsistent with the bulk of the treasure, that certain gold was, more likely than not, passenger gold, rather than part of the insured shipment, this gold should be awarded to Columbus-America in its entirety. Also, should more than $1,219,189 (1857 valuation) of gold be rescued, Columbus-America should be found the owner of any surplus.

On appeal, Columbus-America exerts much effort in asserting that there exists insufficient evidence to prove that the underwriters who are now parties in this litigation actually insured and paid off claims upon the gold. The lower court, though, found *prima facially* that the underwriters did insure the treasure and that they received ownership interests in the gold once the claims were paid. Because of the extent of the catastrophe involved, and its feared repercussions in the American economy, newspapers around the country devoted much space and attention not only to the human aspects of the tragedy, but also the financial. Articles abounded on the quantity of gold aboard, its owners, and its insurers. Some of these articles do contradict others as to the exact amount certain underwiters insured. Still, we find that the district court did not err when it held that the underwriters who are now parties, or their predecessors in interests, paid off claims upon and became the owners of the commercial shipment of gold in 1857.

Despite finding that the underwriters owned the gold in 1857, the district court applied the law of finds and awarded Columbus-America the entire treasure. This was because at some point the insurers had abandoned their interests in the gold. On appeal, Columbus-America asserts that the lower court found an abandonment because of "20 distinct factors." It is clear, though, that the Court ruled as it did because of only two: the underwriters did nothing to recover the gold after 1858, and they supposedly destroyed all documentation they had regarding payment of claims for the gold.

During trial, the underwriters did not produce any of the original insurance contracts with the insureds, statements from shippers that goods were aboard, bills of lading, or canceled checks or receipts from paying off the claims. While such documents would have existed in 1857, none could be located in 1990. Thus, because an insurance executive testified that the usual practice *today* is for in-

surance companies to destroy worthless documents after five years, the district court found that the above documentation concerning the CENTRAL AMERICA must have been intentionally destroyed in the ordinary course of business. Such destruction, coupled with 130 years of nonuse, equalled, according to the Court, an abandonment. Specifically:

> The insurance carriers destroyed their records relating to the events of the Central America. Exactly when is not shown, but evidence establishes it was their custom to keep records for some five year periods, and thereafter destroy them. However, one expert in marine insurance testified that if a company intended to assert its right to subrogation, it always maintained its documents of proof of the claim and that it had paid the claim, and the fact it disposed of such documents was an indication it abandoned its claim. It is difficult to believe that a company claiming an asset or property worth $150,000.00 in the 1800's or even early 1900's would destroy all evidence of its claim if it had any intention to pursue it, or any hope of recovery. How could one better demonstrate their intention to abandon a claim to or interest in property than to intentionally destroy every evidence of its claim, right or title thereto. . . . They deliberately destroyed every document that would in any way show they had an interest in such a claim and had any intention to pursue it. Why? Their actions speak clearly. They had no hope or idea they could locate the Central America, and even if they could locate it, they had no hope they could recover anything from it. They destroyed the documents and intended thereby to abandon any claim they might have.
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> . . . A clear intention of abandonment is given when all records or memorandum of the property are deliberately destroyed and no effort is made or under-

taken to locate or recover the property for over a hundred years.

742 F.Supp. at 1344-45, 1348.

Contrary to the district court, we cannot find any evidence that the underwriters intentionally or deliberately destroyed any of their documents about the CENTRAL AMERICA. Instead, the only evidence we have is that after 134 years, such documents that may have once existed can no longer be located. With such a passing of time, it seems as, if not more, likely that the documents were lost or unintentionally destroyed, rather than being intentionally destroyed.

As has been mentioned above, a case very similar to ours is *Zych*, *supra*. There, in an opinion handed down after our case was decided below, the Northern District of Illinois held that the insurance company in question did not at any time abandon its interests in the wreck of THE LADY ELGIN prior to its 1990 contract with the foundation. In that case, the only evidence presented as to the actual insurance was six letters found in one of Aetna's letter books. Interestingly, no insurance documents, bills of lading, or claims documents were entered into evidence. The Court, though, distinguished its case from ours, as ours was related by our lower court's opinion, by explaining: "This case, of course, differs from *Columbus-America* in that there is no affirmative act, such as the destruction of documents, which indicates an intent by Aetna to abandon the wreck." 755 F.Supp. at 216. The Court did not explain, nor did it seem perturbed by, the loss of all of Aetna's documents concerning THE LADY ELGIN other than the six letters.

It is undoubtedly true that in our case some of the insurance documents from 134 years ago are missing. Yet, the underwriters did present several other original documents from their files concerning this case, and in at least one instance all the documents in an insurer's

file on the CENTRAL AMERICA were stolen by a would-be salvor. Also, almost all of the evidence in the record actually seems to indicate a specific predisposition on the underwriters' part not to abandon the treasure.

Shortly after the disaster, the underwriters negotiated with a salvage company about rescuing the gold, and the next year a salvage contract was formed between two of the insurers and Brutus de Villeroi. Nothing came of these efforts, and the issue lay dormant for 120 years. Still, it appears that the gold was not totally forgotten, for when the Atlantic Mutual Insurance Company ("Atlantic Mutual") wrote its official history in 1967, it devoted a couple of pages to the CENTRAL AMERICA tragedy and the company's salvage contract with de Villeroi.

Because of drastic advances in deep water salvage, the late 1970s witnessed a good many would-be salvors contacting various underwriters regarding the CENTRAL AMERICA. Atlantic Mutual and The Insurance Company of North America ("INA") opened their archives to these salvors, and several in turn sought to form salvage arrangements with the insurers. In particular was a Norman Scott, who, in 1978, claimed to have located the CENTRAL AMERICA. He approached Atlantic Mutual and INA in reference to forming a salvage contract, and they in turn proceeded to hire a New York law firm to locate the other underwriters and begin salvage negotiations. Scott, though, was mistaken as to his discovery, and no contract was ever formed.

Throughout the early and mid-1980s, would-be salvors continued to contact the underwriters for information on the wreck. Salvage contracts were sporadically discussed, but at no time did the insurers ever agree to abandon their ownership interests in the gold.[7] As late as 1987,

[7] One typical example is from 1980, when an Edwin R. Fite of Pascagoula, Mississippi, contacted Atlantic Mutual for information on the CENTRAL AMERICA, and also inquired as to "how much

INA was negotiating a salvage contract with Boston Salvage Consultants, Inc., whereby INA would receive two percent of any treasure recovered—before the parties could enter into a contract, though, the district court enjoined (through injunction box #1) these and other salvors from working in the area where it was then thought the wreck lay. In addition, not only the American insurers, but also the British, entered into various salvage negotiations, the latter through their Salvage Association.

It is ironic that one of the salvors who contacted the underwriters in the 1980s was Columbus-America itself. The eventual salvor used Atlantic Mutual's extensive library for research and then, in 1987, it, through an attorney, wrote the following enigmatic letter to many of the underwriters:

> We are writing to a number of insurance companies on behalf of one of our clients. Our client is acquiring the rights to various 19th Century marine wrecks. If [your company] claims or asserts any interest in vessels or cargo which were wrecked in the Atlantic Ocean during the 19th Century and would consider conveying its claim or asserted interest, please get in touch with me.
>
> Our client would also be interested in obtaining or seeing any existing records upon which [your company] might assert a claim to any 19th Century wrecked vessel or its cargo.

Of course, none of the underwriters responded affirmatively to such a broad and mystifying request.[8]

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it would cost to purchase the insurance claims to this wreck?" Atlantic Mutual responded by suggesting that Mr. Fite contact the law firm it had hired for such requests, and the letter also stated, "we are not interested in relinquishing any rights with respect to the cargo."

[8] Atlantic Mutual did write back and request additional information, and when this was furnished, the insurer responded, "It is our

In conclusion, when a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment and such must be proved by clear and convincing evidence. Here, we are unable to find the requisite evidence that could lead a court to conclude that the underwriters affirmatively abandoned their interest in the gold. Thus, we hold that the lower court clearly erred when it found an abandonment and applied the law of finds. Accordingly, the case is remanded to the district court for further proceedings.

C.

On remand, the district court is to apply the law of salvage, and in so doing it must determine what percentage of the gold each underwriter insured. Equally, if not more, important, the Court must also determine the proper salvage award for Columbus-America. Although this is a decision that must be left to the lower court, we are hazarding but little to say that Columbus-America should, and will, receive by far the largest share of the treasure.

In setting a salvage award, a court of admiralty becomes a court of equity. *THE BOSTON*, 3 F.Cas. 932, 937 (C.C.D.Mass.1833) (No. 1,673) (Story, J.) Such an award "is a compensation for meritorious services, [and] it may properly be increased, diminished, or wholly forfeited, according to the merit or demerit of the salvor, in his relation to the property saved." W. Marvin, *A Treatise on the Law of Wreck and Salvage* § 218, at 226 (1858). An award for salvage "generally far exceeds a mere remuneration *pro opere et labore*—the excess being intended, upon principles of sound public policy, not only as a reward to the particular salvor, but, also, as an inducement to others to render like services."

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intention to retain any rights that may be due us under general maritime law (or otherwise) and accordingly we do not wish to convey any claims or interest to your client."

Id. § 97, at 105; *see also Mason v. THE BLAIREAU*, 6 U.S. (2 Cranch) 240, 266, 2 L.Ed. 266 (1804).

The Supreme Court has listed six "main ingredients" admiralty courts use when fixing an award for salvage:

> (1.) The labor expended by the salvors in rendering the salvage service. (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3.) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4.) The risk incured by the salvors in securing the property from the impending peril. (5.) The value of the property saved. (6.) The degree of danger from which the property was rescued.

THE BLACKWALL, 77 U.S. (10 Wall) 1, 13-14, 19 L.Ed. 870 (1869).

We thoroughly agree with all six and, in cases such as this, would add another: the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salved. In *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F.Supp. 308 (S.D.Fla.1986), the Southern District of Florida held that such a factor may be heavily considered when exclusive salvage rights are sought.[9] This same court has also stated that, "federal admiralty

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[9] The Court stated:

> No party in this action has engaged in independent historical research . . . [n]or has any party made a real effort to preserve the archaeological integrity of the purported wreck site. . . . Archaeological preservation, onsite photography, and the marking of sites are particularly important in the instant context, as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought.

631 F.Supp. at 310.

procedures sanction salvaging methods which fail to safeguard items and the invaluable archeological information associated with the artifacts salved." *Cobb Coin*, 525 F.Supp. at 208. We agree, and would only add that the converse to this latter statement is also true—salvors who seek to preserve and enhance the historical value of ancient shipwrecks should be justly rewarded.

From a distance, it appears that all seven of these considerations militate towards awarding Columbus-America a significant portion of the recovered gold. Of course, it will be up to the district court to determine if this is actually the case and what salvage award should be given.

As for the logistics in making a salvage award, we believe that in a case such as this, an award *in specie* would be proper. *See, e.g.*, *Cobb Coin*, 525 F.Supp. at 198 (when items salvaged are "uniquely and intrinsically valuable beyond their monetary worth, an award *in specie* is more appropriate"). Also, because salvaging efforts have not been completed, the lower court might want to consider denominating the award as a percentage of the total recovery, rather than as a set monetary amount should a specific monetary award be set too high, the underwriters could end up receiving nothing, while if an award is set too low, Columbus-America would have a disincentive to completely recovering the gold.

No matter what exact award is given, though, we are confident that Columbus-America will be justly rewarded for its extensive efforts in salvaging the CENTRAL AMERICA.

III.

The final issue on appeal concerns the claims of the intervenors, Columbia, John, and Grimm. At trial, the district court held that for the intervenors to be eligible for any recovery, they had to prove that Columbus-America made use of the information provided and that

such "information lead to or assisted in locating the CENTRAL AMERICA." The Court then dismissed the intervenors' claim, finding that "there [was] no credible evidence in the record to establish either of these as a fact." 742 F.Supp. at 1339-40. On appeal, the intervenors claim that the reason such evidence was not in the record is that once intervention was allowed, the district court abused its discretion by not allowing any pretrial discovery.

The district court allowed Columbia, John, and Grimm to intervene, but only on the condition that they would begin trial the next day, thereby foregoing all pretrial discovery. Columbus-America now defends the Court's decision by stating that because the would be intervenors waited until the eve of trial to attempt intervention, the Court had it within its discretion to deny the intervention, and thus, *a fortiori*, the Court also had the discretion to limit discovery. Whether the district court could have denied the intervention motion because of timeliness is an interesting question not before us.[10] Even if the intervention could have been denied, though, it does not follow that once intervention was allowed the Court could effectively deny all discovery.

When granting an application for permissive intervention, a federal district court is able to impose almost

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[10] After Columbus-America reported finding the CENTRAL AMERICA in 1987, the intervenors had no reason to follow the case because the Court's first injunction box covered an area of the ocean approximately thirty miles from where Dr. Ryan had surveyed. In 1989, though, Columbus-America realized it had been salvaging the wrong ship and thus went to court and received a second injunction, this one covering the area where the ship actually lay. Columbus-America published the coordinates of this new area in its Supplemental Rule C notice in the *Virginia Pilot and Ledger Star* on September 7, 1989. While such publication is to give constructive notice, the intervenors did not have actual notice until February 1990, less than two months before they filed their petitions to intervene.

any condition, including the limitation of discovery. *See* 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1922, at 50205 (2d ed. 1986). The intervention here, though, was an intervention of right, and historically most courts and commentators have held that conditions cannot be imposed on such intervention. *Id.* § 1922, at 505. In general, intervenors of right "assume the status of full participants in a lawsuit and are normally treated as if they were original parties once intervention is granted." *District of Columbia v. Merit Systems Protection Board*, 762 F.2d 129, 132 (D.C.Cir. 1985).

The Advisory Committee Note to the 1966 amendment of Federal Rule of Civil Procedure 24(a) states that, "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." At least one prominent commentator, though, has questioned this conclusion, noting that the Committee "cites no authority for [its] statement." 7C *Federal Practice and Procedure* § 1922, at 505-06. Still, several courts have followed the Committee's advice and imposed reasonable conditions of a housekeeping nature. *Id.* § 1922, at 506-07. Presently, we need not decide if such conditions are ever proper, for we find that the Court's denial of discovery here was clearly unreasonable.

While the efficient administration of justice is always an important consideration, fundamental fairness to every litigant is an even greater concern. In *Freehill v. Lewis*, 355 F.2d 46, 48 (4th Cir.1966), we stated:

> the spirit of the rules does not require that completeness in the exposure of issues in the pretrial discovery proceedings be sacrificed to speed in reaching the ultimate trial on the merits. Delay should be avoided to the extent that it is unnecessary or unreasonable

but adequate time must be allowed for discovery of the facts and assembly of the proof.

Of course, what is ironic about our case is that an unconditional granting of intervention would not have necessarily caused any delay at all. The Court had earlier bifurcated the trial so that the first phase only concerned whether the underwriters had abandoned the gold; should no abandonment be found, a second phase, examining what the underwriters actually insured and setting the proper salvage award, would also be necessary. The intervenors asked the lower court to try their issue during the second phase of the trial, or, if a second phase were not necessary, at some later time. To us, this request appears perfectly logical: the original trial could begin and proceed as scheduled; the intervenors would have a reasonable time for discovery; and the abandonment portion of the trial would not be complicated by the addition of a totally unrelated issue. Also, considering the strong and convincing proof necessary for a finding of abandonment, the necessity of having a second phase should have appeared fairly certain to the district court. The Court, though, denied the intervenors' request and forced them to begin trial without any discovery.

"Due process mandates that a judicial proceeding give all parties an opportunity to be heard on the *critical and decisive allegations* which go to the *core* of the parties' claim or defense and to present evidence on the contested facts." *Complaint of Bakers Trust Company*, 752 F.2d 874, 890 (3d Cir.1984) (emphasis in original). Also, we agree with Justice Black that, "No judge is granted power . . . to completely deny a party all opportunity to take depositions or to get affidavits essentially needed to get a fair trial of his case." *First National Bank v. Cities Service Co.*, 391 U.S. 253, 306, 88 S.Ct. 1575, 1601, 20 L.Ed.2d 569 (1968) (Black, J., dissenting). We thus find that the district court abused its discretion by forcing the intervenors to begin trial without an opportunity

for any discovery. Accordingly, this portion of the case is reversed and remanded for discovery and a new trial. Should it be found that Columbus-America used the intervenors' information and such use contributed to the discovery of the CENTRAL AMERICA, a salvage award could be proper.

REVERSED AND REMANDED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

Erasmus is a tough act to follow.

But even tougher is the Supreme Court of the United States.[1]

In *Bessemer City*, of course, the Court emphasized that the findings of fact of a district court, especially when the judge has heard the witnesses *ore tenus* in open court, shall not be set aside unless clearly erroneous, with due regard being given to the opportunity of the trial court to judge the credibility of the witnesses. In that decision, the Court reminded us of several principles that should be repeated here: "a reviewing court [must not] reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently," 470 U.S. at 573, 105 S.Ct. at 1511; "appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*," 470 U.S. at 573, 105 S.Ct. at 1511; "[w]here there are two permissible views of evidence, the factfinder's choice between them cannot be clearly erroneous," 470 U.S. at 574, 105 S.Ct. at 1511; and "[t]his is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evi-

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[1] *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

dence or inferences from other facts." 470 U.S. at 574, 105 S.Ct. at 1511.

In deciding this case, we must couple the deferential standard of review of factual findings set forth in *Bessemer City* with the law, unmentioned in the majority opinion, that a finding of abandonment is a factual finding subject to the clearly erroneous standard. *Nunley v. M/V DAUNTLESS COLOCOTRONIS*, 863 F.2d 1190, 1198 (5th Cir. 1989); see also *Bunge Corp. v. Agri-Trans Corp.*, 542 F.Supp. 961, 969 (N.D.Miss.1982), aff'd in part, vacated in part on other grounds, 721 F.2d 1005 (5th Cir. 1983); *Williamson v. Mennella*, 248 A.D. 911, 290 N.Y.S. 645 (1936); *The Port Hunter*, 6 F.Supp. 1009, 1011 (D. Mass. 1934); *De Bardeleben Coal Co. v. Cox*, 16 Ala.App. 172, 76 So. 409, 410 (1917), cert. denied, 200 Ala. 553, 76 So. 911 (1917); *Steinbraker v. Crouse*, 169 Md. 453, 182 A. 448 (1936); *H.B. Chermside, Jr., Annotation, Rights In and Ownership of Wrecked or Derelict Vessels and Their Contents Not Cast Upon the Shore*, 63 A.L.R.2d 1369, 1373 3[b]; 1 C.J.S. *Abandonment* § 11; *City of New London v. Pequot Point Beach Co.*, 112 Conn. 340, 152 A. 136, 138 (1930) (real property); *Bennett v. Bowers*, 238 Iowa 702, 28 N.W.2d 618, 620 (1947) (real property); *Ray Coal Mining Co. v. Ross*, 169 Iowa 210, 151 N.W. 63, 65 (1915) (lease); *Cadillac Oil & Gas Co. v. Harrison*, 196 Ky. 290, 244 S.W. 669, 671 (1922) (lease); *Anson v. Tietze*, 354 Mo. 552, 190 S.W.2d 193, 196 (1945) (real property); *Newman Signs, Inc. v. Hjelle*, 317 N.W.2d 810, 817 (N.D.1982) (signs); *Llewellyn v. Philadelphia & Reading Coal & Iron Co.*, 308 Pa. 497, 162 A. 429, 430 (1932) (personal property); *McMillin v. Titus*, 222 Pa. 500, 72 A. 240, 244 (1909) (lease); *Jordan v. State*, 107 Tex.Crim. 414, 296 S.W. 585, 587 (1927) (personal property); *Garrett v. South Penn Oil Co.*, 66 W.Va. 587, 66 S.E. 741, 745 (1909) (lease). I am convinced that the majority decision is incorrect in its principal holding that the district court's

factual finding of abandonment was clearly erroneous; in applying the law of salvage to a long lost wreck; in making factual findings as an appellant court; and in erroneously stating the issue to be decided by the district court on remand. In addition, I would hold that the district court did not abuse its discretion in attaching conditions to the untimely motions for intervention.

Finding of Abandonment

In my view, throughout its opinion, the majority has disregarded the rules set forth by the Supreme Court in *Bessemer City*. The majority, in contravention of the mandate that "[w]here there are two permissible views of evidence, the factfinder's choice between them cannot be clearly erroneous," reverses the district court's factual finding as clearly erroneous simply because, in my opinion, "it would have decided the case differently." *Bessemer City*, 470 U.S. at 573-74, 105 S.Ct. at 1511-12.

The district court found as a fact that the property taken from the CENTRAL AMERICA had been abandoned by its owners. I would hold that the district court was not clearly erroneous in making that determination. The circumstances of the insurance companies' failure to retain any indicia of ownership, such as bills of lading or commercial invoices, or to make any attempt to recover the property since 1858, coupled with the passage of more than 100 years, is ample evidence (not to mention details) to support the district court's finding that any claim the insurance companies may have had in the cargo of the CENTRAL AMERICA has been abandoned.

The majority holds that the district court committed clear error in finding abandonment because it was "unable to find the requisite evidence that could lead a court to conclude that the underwriters affirmatively abandoned their interest in the gold, and specifically, the majority could not "find any evidence that the underwriters intentionally or deliberately destroyed any of their documents

about the CENTRAL AMERICA." Majority op. at 467-468. In my opinion, both the district court's finding of abandonment and its specific finding that the underwriters intentionally destroyed the documents are amply supported by the evidence.[2] The majority's holding, by necessary implication, must be that abandonment can only be shown by an express statement by the owner indicating his intention to abandon. This holding, in my opinion, cannot be reconciled with established precedent. Abandonment may be inferred from all of the relevant facts and circumstances and may be deter mined [*sic*] on the basis of circumstantial evidence. See *Hatteras, Inc. v. The U.S.S. Hatteras*, 1984 A.M.C. 1094, 1097 n. 5 (S.D.Tex. 1981) ("A formal declaration is not necessary; abandonment may be inferred from acts and conduct of an owner clearly inconsistent with an intention to return to the property, and from the nature and situation of the property.");

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[2] The majority makes much of the fact that the documents may have been lost or stolen. As I have stated, I think the evidence establishes that the most likely inference is that the documents were destroyed, in the regular course of business, as worthless. In any event, I believe resolution of the question of whether the documents were destroyed or lost is unnecessary to a finding of abandonment. The insurance companies affirmatively abandoned any property interest they had in the cargo of the CENTRAL AMERICA by not maintaining the indicia of ownership they may have had at one time pertaining to the cargo on the CENTRAL AMERICA. We cannot know, more than 100 years after the fact, why the relevant documents are no longer in the possession of the insurance companies. However, we do know that any documentation that may have existed was in the control of the insurance companies and they no longer have these documents. Had they believed that a situation would arise where they would need to prove that they had paid claims on the cargo, they certainly would have taken steps to maintain and protect the documents pertaining to the CENTRAL AMERICA. The fact that the companies do not know when the documents were last in their possession or the circumstances of their removal is sufficient evidence that they viewed the documents as worthless. The obvious inference to be drawn from the fact that the insurance companies did not maintain their documents or any record of their documents is that they had abandoned their claims to the property

City of New London v. Pequot Point Beach Co., 112 Conn. 340, 152 A. 136, 138 (1930) (real property) ("intent [to abandon] may be inferred as a fact from the surrounding circumstances"); *Llewellyn v. Philadelphia & Reading Coal & Iron Co.*, 308 Pa. 497, 162 A. 429, 430 (1932) (personal property) ("intention [to abandon] may, and indeed often must be, inferred from acts"); *Pierce v. Bemis (The Lusitania)*, [1986] 1 Q.B. 384, 389 ("So far as the owners of the contents are concerned, it is a necessary inference from the agreed facts and from the lapse of 67 years before any attempt was made to salve the contents that the owners of the contents abandoned their property"); 1 Am.Jur.2d *Abandoned, Lost and Unclaimed Property* § 40 ("it is not necessary to prove intention to abandon by express declarations or other direct evidence").

Testimony was presented, for example, that the practice of the marine insurance industry is to require that the insured present a commercial invoice and a bill of lading prior to a claim being paid, and that the practice in that industry is much the same today as it was in 1857. The insurance company then retains those documents as proof of ownership with potential salvors. None of the insurers in this action produced any invoices or bills of lading regarding shipments on the CENTRAL AMERICA. (Atlantic Mutual—J.A. 991, 999; London Assurance and the Alliance Assurance Co.—J.A. 1054, 1069; Royal Exchange Assurance—J.A. 1105-1105A; Indemnity Marine Assurance Company J.A. 1131; Salvage Association—J.A. 1153; Insurance Company of America J.A. 1195). The marine insurance companies involved routinely destroyed their records on a periodic basis. However, they do not destroy documents so long as they retain an interest in the cargo of which the documents reflect ownership.[3] It is doubt-

[3] Testimony at trial concerning the companies' document retention policies was typified by an insurance company representative who was asked, "And if you thought there was any hope of recovering

lessly expensive to maintain all records which an insurance business generates, therefore the companies have made the business decision not to keep documents which are unnecessary. The obvious, most logical, and clearly permissible inference from the fact that the insurance companies did not retain any documents pertaining to the CENTRAL AMERICA is that, at some point during the past hundred and thirtyodd years, the companies, giving up any expectation of ever recovering the property, destroyed their documents and, in so doing, evidence their abandonment of their claims to the CENTRAL AMERICA.[4] See *Wyman v. Hurlburt*, 12 Ohio 81, 87 (1843) (vessel is abandoned when "all hope, expectation, and intention to recover the property were utterly and entirely relinquished" by the owner); *U.S. v. Smiley*, 27 F.Cas. 1132, 1134 (Cir.Ct.N.D.Cal. 1864) (Justice Field) (cargo

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goods, you would not let those documents be destroyed, would you?" He replied, "No, I wouldn't."

London Assurance's representative testified that a marine insurance company would keep the documents for so long as the company retained an interest in lost cargo. Representatives for Royal Exchange Assurance and Indemnity Marine Assurance each testified that their company's policy was to retain documents for so long as it feels they are necessary and disposed of only when they serve no purpose whatsoever.

[4] The majority writes that because of the long passage of time, "it seems as, if not more, likely that the documents were lost or unintentionally destroyed, rather than being intentionally destroyed." Slip op. at 466. Not only is this a factfinding by a court of appeals, opposite to the inference drawn by the district court and contrary to *Bessemer City*, the majority also puts the onus on the finders to prove that the insurance companies' destruction of documents pertaining to the CENTRAL AMERICA was deliberate. In the absence of any showing to the contrary, I would place the burden on those who last had possession of the documents to establish that they were "lost or unintentionally destroyed." Indeed, standard learning is that the failure of a party who possesses a document to produce it permits an inference that its tenor is unfavorable to the party's cause. See *Missouri, K. & T. Ry. Co. v. Elliott*, 102 F. 96, 101, 103 (8th Cir. 1900); *Wigmore on Evidence, Chadbourn* (1979) 285, 291.

from shipwreck was abandoned when "all efforts to recover the property had been given up" by the owners.)

Indeed, I further submit that the specific finding that the insurance companies destroyed their documents is amply supported in the record by both direct and circumstantial evidence. The following testimony of one Richard Smith, Atlantic Mutual's representative at trial, is sufficient, in and of itself, to support the district court's finding:

> Mr. Davey (Attorney for Columbus-America): You don't have any of the policies today that may have covered goods on board the CENTRAL AMERICA, do you?
>
> Mr. Smith: At present, we do not.
>
> Mr. Davey: To the best of your knowledge, they have all been routinely destroyed along with the other business records of the company?
>
> Mr. Smith: That's correct.
>
> * * * *
>
> Mr. Davey: So that the bills of lading which would have been taken up as part of the proof of loss have been destroyed as a matter of course?
>
> Mr. Smith: If they had been taken up, they probably would have been destroyed in that and/or we moved several times. They could have been missing in that. Probably in the destruction when we destroyed the claim files if they existed. They would have been destroyed.
>
> * * * *
>
> Mr. Davey: But any record of sale would have been destroyed in the ordinary course of your business just like the insurance policies, the bills of lading and commercial invoices and everything else?
>
> Mr. Smith: Yes, sir, if one existed.

Evidently, the majority did not consider this testimony, as it states that the district court held that the documents were intentionally destroyed "because an insurance executive testified that the usual practice *today* is for insurance companies to destroy worthless documents after five years. . . ." Majority op. at 466 (emphasis supplied by the majority). Even that contention of the majority is also incorrect, I submit, because testimony was presented, not just as to the current practice, but as to the document destruction policies of the companies for more than 40 years. The insurance companies' representatives testified that, for as long as they had worked for the companies (which in some cases was over 40 years), the companies had document destruction policies in place.[5]

The majority's holding that "it seems as, if not more, likely that the documents were lost or unintentionally destroyed, rather than being intentionally destroyed," illustrates the majority's misconception of our role on appeal. It is not our role to decide a case on appeal based on which factual inference we would draw from the evidence. See *Bessemer City*, 470 U.S. at 573-74, 105 S.Ct. at 1511-12. Rather we should only determine if the factual inferences drawn by the district court are supported by the evidence. In addition to the clear testimony of Atlantic Mutual's representative that the policies covering goods on the CENTRAL AMERICA were destroyed and that the

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[5] Alan John Birch, who appeared as a representative of claimants London Assurance and the Alliance Assurance Company, began in the marine claims business 43 years ago for London Assurance. He testified that the longest period of document retention that he was aware of at the company was 10 years, and that so long as the company retained an interest in lost cargo, it would not destroy the documents with respect to the loss.

Richard Smith, Atlantic Mutual's representative, has worked for the company for 30 years. He testified that during his entire tenure at Atlantic Mutual, the company has had a document destruction policy, under which it destroys claim files and other documents after from five to 10 years.

bills of lading were probably destroyed, the evidence showed that not one of the numerous insurance companies involved in this litigation was able to produce any of the documents that would have to be produced prior to a claim being paid, and that the companies destroy documents on a routine basis. In my opinion, these facts fully support the inference drawn by the district court, but rejected by the majority, that the documents were intentionally destroyed.

In addition, the passage of over 130 years since the cargo was lost is strong circumstantial evidence of abandonment.[6] And, as the First Circuit has stated in

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[6] I would hold that long-lost wrecks such as the one in question here are presumptively abandoned. See *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F.2d 1059, 1065 (1st Cir.1987) (law of finds applies when "articles have been presumptively abandoned, *i.e.*, either affirmatively renounced, or *so long lost that time can be presumed to have eroded any realistic claim of original title* . . . .") (emphasis added). "Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330, 337 (5th Cir.1978). In *Treasure Salvors,* the Fifth Circuit held that disposition of the treasure retrieved from a Spanish galleon, the NUESTRA SENORA DE ATOCHA, sunk in 1622 and found near the Marquesas Keys in the Gulf of Mexico, should be governed by the law of finds rather than salvage law.

Under the law of finds, title is vested in "the first finder lawfully and fairly appropriating it and reducing it to possession, with the intention to become its owner." 569 F.2d at 337, quoting *Rickard v. Pringle,* 293 F.Supp. 981, 984 (E.D.N.Y.1968). Salvage law provides that the original owner maintains ownership and the recoverer only receives a salvage award.

The majority attempts to distinguish *Treasure Salvors* from the instant case on the fact that the parties in Treasure Salvors had stipulated that the ATOCHA had been abandoned by its original owner, the Spanish government. Nothing in the court's opinion indicates that the decision would have been any different had the Spanish government appeared in court to assert a claim. The parties merely stipulated to an obvious fact, that the long lost ship was abandoned.

Martha's Vinyard, 833 F.2d at 1065, when "articles have been so long lost that time can be presumed to have eroded any realistic claim of original title, and . . . those articles are now in hand, having been actually recovered, the better-reasoned authorities agree that the law of finds may appropriately be utilized." See *Chance v. Certain Artifacts Found and Salvaged*, 606 F.Supp. 801, 804 (S.D.Ga. 1984), aff'd without opinion, 775 F.2d 302 (11th Cir. 1985) ("Under the law of finds, the inference of abandonment may arise from lapse of time and nonuse of the property . . . since THE NASHVILLE has rested at the bottom of the Ogeechee, unclaimed by its owner since 1863, this court concludes that the law of finds applies.") As the amount of time since the loss of the ship increases, the strength of the presumption that the property has been abandoned, stated above, increases, I suggest. In this case, more than 130 years is sufficient to establish a very strong presumption that the property has been abandoned.[7]

At the risk or [*sic*] repetition, I again state that I think the majority's out-of-hand dismissal as clearly erroneous the district court's finding of abandonment is quite contrary to law, for the inferences and factual conclusions made by the district court are supported by the evidence. Indeed, even as to lack of weight, the weakness of the

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[7] The difficulty in adjudicating rights concerning cargo on a ship lost for 135 years is underscored by the Herculean task facing the district court on remand. Contrary to the majority's assertion that "[w]ithout doubt, most, if not all, of the claims were promptly paid off by the underwriters," at 456-57, there is doubt as to how much of the cargo was actually insured and, just as importantly, which insurance claims were actually paid. The only evidence available are speculative newspaper accounts from the 1850's. On remand, the district court will be faced with the difficult, if not impossible, task of determining which claims were paid by the insurance companies and in what amounts. This problem is caused by the insurance companies' failure to maintain the records necessary to establish their claims. Had the insurance companies not abandoned their claims they surely would have maintained the records necessary to establish their amount.

evidence relied upon by the majority is exposed by only casual analysis. The majority writes that "almost all of the evidence in the record actually seems to indicate a specific predisposition on the underwriters' part not to abandon the treasure." Majority op. at 467. However, all the majority points to in support of this proposition is evidence of salvage negotiations in the 1860's involving two of the insurers, the fact that Atlantic Mutual, in its official history, written in 1967, devoted a couple of pages to the tragedy, and the insurers' actions from the late 1970's to the present upon being contacted by potential salvors concerning their potentional claims. Majority op. at 467-468.

Evidence of salvage negotiations from the 1860's is, of course, of little consequence in determining if the insurers abandoned their claims subsequent to the 1860's. And the very fact that the 1860's efforts at salvage were either abandoned or not undertaken is, indeed, evidence of abandonment. In fact, it is highly likely that at the time the insurers explored the 1860's salvage options, they possessed all the documentation concerning their claims. They knew those documents would be necessary to establish the amounts of their claims. It was probably not until after the salvage operations proved unsuccessful that the insurers abandoned their claims. They destroyed the only documentation that would be necessary to prove the amounts of their claims when, at a later time, they lost all hope of recovering the property. In so doing, the district court held there was evidence of abandonment, and I agree.

The fact that Atlantic Mutual mentioned the CENTRAL AMERICA tragedy in its official history is, in my view, no evidence of a "specific predisposition" not to abandon the property. It indicates no more for Atlantic Mutual than that Atlantic Mutual, which believed it was an insurer of some of the cargo, found the sinking of the CENTRAL AMERICA to have been an interesting historical matter

in the company's history. Indeed, the fact that that history shows that Atlantic Mutual has *even now* retained some papers referring to the CENTRAL AMERICA, but not the papers necessary to prove a claim or even the amount of the loss, is evidence that the matter was later abandoned.

Finally, evidence of the insurers' actions concerning their potential claims from the 1970's to the present is of little consequence in determining whether the insurers abandoned their claims prior to the 1970's. Property, once abandoned, cannot be reclaimed absent possession. See 1 C.J.S. *Abandonment* § 12. It is apparent that the insurers abandoned the property because at the time they did so, they had no hope of ever recovering it. Clearly, once the technology became available following World War II to make recovery a possibility, the insurers would not agree that they had abandoned any claim. This explains their activity in the recent past and their establishment of files. However, since property, once abandoned, cannot be reclaimed absent possession, in my view their 1970's and subsequent activity is of little consequence in determining whether they abandoned their claims at some point during the previous 120 years. A property interest abandoned as valueless cannot be revived simply because new technology, some 120 years later, has made the abandonment seem to have been error. In fact, an equally or more valid inference than the one drawn by the majority is that the insurance companies' creation of files in the 1970's and '80's, pertaining to the CENTRAL AMERICA, supports the conclusion that they had abandoned their claims.[8] These files were created when potential salvors contacted the insurance companies in the 1970's and '80's.[9] Had each

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[8] For the most part, these files contained nothing more than newspaper clippings and letters from potential salvors.

[9] The fact that would-be salvors contacted some of the insurance companies is, of course, of no consequence in determining whether the property was abandoned. A reasonable person might seek to avoid litigation with potential claimants by obtaining assignments of any possible claims they may have.

insurer not abandoned its claim earlier, there would have been no need to create a file because one would have existed since 1857. By reasonable inference, each insurer believed the cargo it insured on the CENTRAL AMERICA was irretrievably lost and any property interest it had in the cargo was worthless. As a consequence, each insurer abandoned what to them was a worthless interest in the cargo.

Also, it is interesting that, even after the technology for recovering the CENTRAL AMERICA became available, the insurers did not enter into any salvage contracts concerning its recovery. They did nothing to recover the property, just as they had done for the past 130-plus years.

As I have shown, the evidence offered by the majority provides little support for its argument that the insurers did not abandon their claims. In my opinion, the majority's substitution of its judgment as to the facts is even more improper when, as here, there is ample support in the record for the district court's factual finding of abandonment.

Finds v. Salvage

I disagree with the majority's decision to apply the law of salvage to the facts of this case. It appears to base its decision on the erroneous belief that courts favor applying salvage law rather than the law of finds. Majority op. at 460. In fact, in the context of long lost wrecks, such as the instant case, courts, almost without exception, apply the law of finds. *Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir.1987) (ocean liner sunk in 1909); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir.1985) (English ship sunk in eighteenth century); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir.1978) (Spanish galleon sunk in 1622); *Sub-Sal, Inc. v. The DeBraak*, No.

84-296, 1992 WL 39050, at * 1-2, 1992 U.S. Dist. LEXIS 2461, at * 6-7 (D.Del.1992) (British ship sunk in 1798); *Zych v. Unidentified, Wrecked and Abandoned Vessel*, 746 F.Supp. 1334, 1343-44 n. 12 (N.D.Ill.1990), vacated, 941 F.2d 525 (1991) (steamer sunk in 1860); *Jupiter Wreck, Inc. v. Unidentified Sailing Vessel*, 691 F.Supp. 1377, 1385 (S.D.Fla.1988) (Spanish galleon sunk in seventeenth century); *Indian River Recovery Co. v. The China*, 645 F.Supp. 141, 144 (D.Del.1986) (ship sunk in nineteenth century); *Chance v. Certain Artifacts Found and Salvaged from the NASHVILLE*, 606 F.Supp. 801, 804 (S.D. Ga.1984) (Confederate raider sunk in 1863); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F.Supp. 452, 456 (E.D.Va.1960) (Norwegian ship sunk in 1894); *Commonwealth v. Maritime Underwater Surveys, Inc.*, 403 Mass. 501, 531 N.E.2d 549, 552 (1988) (pirate ship sunk in 1717); see also Schoenbaum, *Admiralty and Maritime Law* § 15-7, p. 514 (1987) ("In virtually all of the treasure salvage cases involving wrecks of great antiquity, the law of finds, not salvage, is appropriate . . .") Even *Benedict on Admiralty*, from which much of the majority's opinion appears to have been derived, would apply finds law to "long lost wrecks." See 3A Norris, *Benedict on Admiralty*, § 158, p. 11-17 (1992).

Modern courts have rejected application of the law of salvage in the context of long lost wrecks because, under the law of salvage, even an abandonment does not divest the owner of title. See 3A Norris, *Benedict on Admiralty*, § 150, p. 11-1 (1992) ("Should a vessel be abandoned without hope of recovery or return, the right of property still remains in her owner."); *Sub-Sal, Inc. v. The DeBraak*, No. 84-296, 1992 WL 39050, at * 1-2, 1992 U.S. Dist. LEXIS 2461, at * 6-7 (D.Del.1992) ("Cognizant that the appliction of salvage law involves a presumption that the owner of an abandoned vessel has not been divested of title, this Court rejects the salvage law theory."). The major premise of salvage law, that the property to be

salved is owned by persons other than the salvor, is inapplicable in the case of long lost wrecks. See Schoenbaum, *Admiralty and Maritime Law*, § 15-7, p. 512 (1987).

The majority opinion breaks with the law of every other circuit that has decided the question and holds salvage law to be applicable to long lost wrecks. See *Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir.1987) (ocean liner sunk in 1909); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) (English ship sunk in eighteenth century); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir.1978) (Spanish galleon sunk in 1622). I agree with our sister circuits that "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Treasure Salvors, Inc.*, 569 F.2d at 337.

Impermissible Factfinding

Also, the majority has disregarded well-established law that appellate courts should not engage in factfinding. The majority has decided, on appeal, that the insured shipment was worth $1,219,189 (1857 valuation) when the amount of the insured shipment was not an issue before the district court. Majority op. at 465 n. 6.

The trial before the district court was to be bifurcated. The first portion was to decide if the insurers or anyone else could establish a claim to portions of the cargo. The second part of the trial was to involve a determination of the amount to be awarded to any claimants who established they had a valid claim. However, the second part of the trial was never held since the district court determined that no one other than Columbus-America had established a right to any of the cargo. Therefore, the question of how much of the shipment was insured was not

before the district court and should not be decided in the first instance by this court.

In addition, the majority finds as a fact that the insurers had established an ownership interest in the cargo. Majority op. at 465-466. The majority attempts to disguise its factfinding by attributing a holding to the district court that was, in fact, never made by it. The majority writes that "the district court did not err when it held that the underwriters who are now parties, or their predecessors in interests, paid off claims upon and became the owners of the commercial shipment of gold in 1857." Mapority op. at 465. The district court did not hold that the underwriters had paid claims and become owners of the commercial shipment. The district court did not decide the factual issue of whether the insurers had proven that they had an ownership interest in the cargo because the district court clearly was satisfied, as am I, that in any event the cargo had been abandoned.[10] Since the district court did

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[10] As evidenced by the following passage in the district court's opinion, the court clearly was unimpressed with the evidence presented by the insurance companies as to ownership:

> Insurance Companies rely solely upon the newspaper accounts for evidence that they were insurers, the name of the insured, the amount of the insurance, the value of the shipment, whether a claim was made, what sum was supposedly paid, and to whom. They well must rely on the newspaper articles for they have no copies of any insurance policies, invoices for shipments, proof of loss, amounts paid or other records. Without the newspaper accounts, the evidence is totally insufficient to establish any claim of the insurance companies.

Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 742 F.Supp. 1327, 1341 (E.D.Va. 1990).

The majority appears to have concluded that since the district court stated that the evidence was "totally insufficient" without the newspaper accounts, the court was implicitly stating that the evidence was sufficient with those accounts. I do not agree with this conclusion. I believe the district court was merely stating that without the newspaper accounts there was no evidence to support

not decide the factual question of whether the insurers had established that the claims were ever paid, it is entirely improper for this court to make that factual ruling at this juncture. On remand, the district court should be given an opportunity to fully address the issue of whether the insurers met their burden of proof in establishing an ownership interest in the cargo and, in its proper role as a finder of fact, to decide that issue in the first instance.

Issue on Remand

In my view, the majority has incorrectly stated the issue to be determined on remand. It writes that the district court "must determine what percentage of the gold each underwriter insured." Majority op. at 468. This ignores the fact that the insurers only became owners of cargo to the extent of their payment of claims. The amount they insured is irrelevant. The crucial fact is how much cargo they actually paid claims on. The burden is on the insurance companies to establish the amount of claims that they actually paid.

Intervention Motion

I also disagree with the majority's holding that the district court abused its discretion by allowing Columbia University, Harry John, and Jack Grimm to intervene on the eve of trial only on the condition that the trial go ahead as scheduled. The trial was set for April 3, 1990. On March 29, 1990, John and Grimm filed their motion to intervene. Columbia filed its motion on April 2, 1990. It would have been well within the district court's discretion to deny the motions to intervene as untimely. See *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir.1989), cert. denied, 493 U.S. 1058, 110 S.Ct. 870, 107 L.Ed.2d

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the insurance companies' claims and with the accounts there was some evidence. The court did not find that the insurance companies had met their burden of proof in establishing that they had paid claims and therefore had acquired an ownership interest in the cargo.

953 (1990) ("This Circuit has stressed the importance of timeliness and the wide discretion afforded the district courts."); *NAACP v. New York*, 413 U.S. 345, 365-66, 93 S.Ct. 2591, 2602-03, 37 L.Ed.2d 648 (1973) (district court's ruling on timeliness will not be disturbed on appeal unless the court abused its discretion). In determining whether a motion to intervene is timely, courts look at how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for the tardiness in moving to intervene. *Gould*, 883 F.2d at 286. In this case, the motions for intervention were filed on the eve of trial after all pre-trial discovery had been performed by the parties then in the suit. Any delay in the commencement of the trial would have prejudiced Columbus-America as its ability to attract funding was directly impacted by resolution of the issues concerning ownership of the cargo, and key members of the recovery team were required at trial and a delay in the trial would have interfered with Columbus-America's recovery efforts. Finally, there was no excuse for the intervenors' tardiness in moving to intervene. They were put on constructive notice, at the latest, on September 7, 1989, when Columbus-America published its Rule C notice in the *Virginia-Pilot and Ledger Star* stating the coordinates of the area where the CENTRAL AMERICA was found. Moreover, the record reveals that Columbia has been aware of, and indeed a part of, this litigation almost from the first moment that Columbus-American first set foot in court. Less than two months after filing its original in rem complaint on July 17, 1987, Columbus-America sought and obtained a preliminary injunction forbidding other would-be recoverers of the treasure from an area then thought to contain the wreck of the CENTRAL AMERICA. See *Columbus-America Deep Search, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, Civil No. 87-363N (E.D. Va. July 17, 1987); App. 53. Not only was Columbia a party in that proceeding and specifically addressed in the district court's order, it appealed and unsuccessfully

sought a stay of the injunction in this court. See order of August 3, 1987 entered in our case no. 873606, which appeal was later dismissed by stipulation on December 18, 1987. The fact that the CENTRAL AMERCA later was found within the area established by the injunction of August 1989, see Civil No. 87363N (E.D.Va. Aug. 18, 1989), does not later the inescapable fact that, at the latest in July of 1987, Columbia had actual knowledge of Columbus-America's assertion of rights over the very wreck that was the subject of Dr. Ryan's work and of the very lawsuit in which Columbia later sought to intervene on the eve of trial. See 742 F.Supp. 1327, 1334 (E.D.Va. 1990); App. 438. Given these facts, it would not have been an abuse of discretion for the district court to have denied the motions for intervention as untimely.

However, rather than deny the motions, as it could have done, the district court conditionally permitted the intervention on the intervenors' willingness to go forward with the trial at its previously scheduled time. Conditions can be imposed on an intervenor even when he intervenes as a matter of right under Rule 24(a). See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383, 107 S.Ct. 1177, 1185, 94 L.Ed.2d 389 (1987) (Brennan, J., concurring) ("restrictions on participation may also be placed on an intervenor of right"); *United States v. South Florida Water Management Dist.*, 922 F.2d 704, 710 & n. 9 (11th Cir.), cert. denied sub nom. *Western Palm Beach County Farm Bureau, Inc. v. United States*, —— U.S. ——, 112 S.Ct. 407, 116 L.Ed.2d 356 (1991); *Harris v. Pernsley*, 820 F.2d 592, 599 n. 11 (3d Cir.1987), cert. denied sub nom. *Castille v. Harris*, 484 U.S. 947, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987); *United States v. Hooker Chemicals & Plastic*, 749 F.2d 968, 99293 n. 22 (2d Cir. 1984); *Morgan v. McDonough*, 726 F.2d 11, 14 (1st Cir. 1984). The conditions imposed by the district court were not onerous considering the untimeliness of the motions for intervention. In fact, the court even allowed the intervenors to perform limited discovery during trial.

If the intervenors were unhappy with the conditions imposed, they had the option of declining the court's offer. Had they done so, their motion to intervene would have been denied and that denial could have been appealed to this court. The majority's holding thus allows the intervenors two days in court instead of the timehonored one. Because they accepted the court's conditions, they were able to particpate in the trial. At trial, they lost. Now the majority's holding will allow them to try their case a second time. I would hold that the district court did not err in conditioning John, Grimm, and Columbia's untimely intervention on their willingness to participate in the trial at its previously scheduled date. The district court, by being overly accommodating to the intervenors, and not requiring them to take the case as they found it, if intervention was granted, as it had every right to do, is now wrongfully found guilty of error, I submit, for its perfectly proper rulings.

The effect of the majority's decision is to allow a prospective intervenor to delay a motion to intervene until the eve of a trial it has known about for months, and then force either a delay in the trial or error. I submit that Rule 24(a) properly admits of no such result.

Conclusion

In sum, I would affirm the district court's judgment. I would hold that the district court was not clearly erroneous in finding that the insurance companies had abandoned all claims they may have had to the cargo in the CENTRAL AMERICA and that the district court did not abuse its discretion in placing conditions on granting of the untimely motions to *intervene*.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
NORFOLK DIVISION

Civ. A. No. 87-363-N

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Plaintiff,

v.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern boundary—31° 37′ North latitude; Southern boundary—31° 33′ North latitude; Western boundary—77° 2′ West longitude; Eastern boundary—76° 57′ West longitude (believed to be the S.S. CENTRAL AMERICA), *in rem*,

Defendant.

Aug. 14, 1990

Richard T. Robol, Philip N. Davey, Robert M. Tata, Hunton & Williams, Norfolk, Va., William J. Kelley, Jr., Curtis A. Loveland, Robert W. Trafford, Porter, Wright, Morris & Arthur, Columbus, Ohio, for plaintiff.

Guilford D. Ware, Crenshaw, Ware & Martin, Norfolk, Va., Douglas A. Jacobsen, Bigham, Englar, Jones & Houston, New York City, for claimants Atlantic Mut., et al.

William W. Nexsen, Stackhouse, Rowe & Smith, Norfolk, Va., John H. Reilly, Jr., Dickerson & Reilly, New York City, for Harry G. John and Jack F. Grimm.

Daniel R. Warman, John Y. Richardson, Jr., Williams, Worrell, Kelly, Greer & Frank, Norfolk, Va., for the Trustees of Columbia University in the City of New York.

OPINION AND ORDER

KELLAM, Senior District Judge.

This admiralty action filed in this Court on May 27, 1987, is an outgrowth of the tragedy of the sea which occurred September 12, 1857, when the Central America sank in the Atlantic Ocean some 160 miles due East of Charleston, South Carolina, where the Gulf Stream meets the Sargasso Sea. She was said to be one of two luxury passenger ships making a run from Aspenwall, Panama, to New York. She was a wooden-hulled, side-wheel steamship built in 1852. During the period prior to completion of the railroad from the East to the West Coast in 1869, travel from San Francisco to New York was principally by steamer to Panama, by train across the Isthmus of Panama to the port of Aspenwall, and then on to New York by steamer. Much of the gold mined in California following the gold rush of 1849 shipped or carried by passengers to the East was by the above route. The subject of this action involves gold shipped and carried by passengers over the above route.

I.

On August 20, 1857, the Pacific Mail Steamship "Sonora" left San Francisco for Panama with a number of passengers and quantities of gold aboard. It docked at Panama on September 3rd. The passengers and gold were put upon the Panama Railroad for the three hours journey to Aspenwall. The passengers with the gold which they were carrying and the shipped gold were

placed upon the side wheeler Central America. The Central America sailed at 4:00 p.m. on September 3rd for Havana. It docked at Havana on September 7th in the evening. After transfer of some passengers and cargo, it sailed on September 8th at 9:30 a.m. for New York. On the evening of the 9th, it encountered the fringe of a hurricane and sailed on into its fury. As a result of the forces of the hurricane, a leak in the ship developed on the morning of the 11th and by 2:00 p.m. of that day, the fire in the boilers was extinguished by the influx of water from the leak. With the continuation of the storm, efforts of the crew and passengers in bailing the ship failed to keep her afloat. Many passengers were transferred by the life boats to two passing steamers, and some others were halued from the water hours after the Central America sank.

News of the tragedy was collected from survivors. Newspapers over several areas of the world collected and published stories of the sinking. Frank Leslie's Illustrated Newspaper published in New York for October 3rd, 1857, reported that when the Central America left Havana for New York, it carried 492 passengers exclusive of the crew. Of that number, 166 were rescued and 336 lost their lives. Many of the passengers were gold miners returning to the East to invest their findings, and others to collect their families and return to California. He further recorded that the Central America was the richest ship, passengers and cargo considered, that was ever engulfed in the waves of the sea, when her rich freight of gold was lost.

The Chicago Tribune, in an article of September 23, 1857, reported that many of the surviving passengers of the Central America stated there was seldom so large an amount of money owned by passengers as those aboard the Central America, numbers of whom reckoned their gold by thousands. The New York Journal of Commerce, in an article of September 23, 1857, said that the

exact number of saved and lost would probably never be known, but that it was generally agreed that when she left Havana, she had on board nearly 600 and that the number saved varied between 166 and 187.

Passenger Jane Badger, who was one of the rescued, said her husband was carrying $17,500.00 with him in gold coins in a carpet bag until just before the ship sank. Passenger Caldwell saved 20 pounds of gold dust carried in a belt around his waist. One passenger reported he had $2,000.00 in gold in a belt. There were other accounts of passengers who had been carrying gold with them aboard the Central America.

In a report to the Secretary of the Navy, Lt. Matthew Fontaine Maury, USN, under date of October 19, 1857, said that there was on board 575 persons and about two million in gold. He further reported that the information concerning the sinking had been compiled from newspaper reporters who had obtained much information from the survivors.

A.

During the last decade, substantial efforts were made to locate the wreck of the Central America. Such efforts were expensive and time consuming. Scientific and historical research required many hours. Plaintiff in this case, as well as the insurance claimants, located numerous newspaper articles published concerning the sinking of the Central America and the loss of life. The services of experts in many fields have been enlisted. Special equipment was and is required for any such type of undertaking. Patience, skill, long hours of hard work, and some degree of luck, a willingness to risk and a deep pocket are and were necessary for such an undertaking. Plaintiff has expended in excess of ten million dollars in the project. While plaintiff is positive it has located the Central America, it is still engaged in its efforts to bring to the surface the artifacts and portions of the cargo.

One will well understand that only portions of the cargo will be found.

II.

Utilizing numerous written accounts, oceanographic, meteorological and other data, modern search theory mathematics, advanced technology and equipment, along with the services of numerous experts, the Columbus-America Discovery Group undertook the search for the wrecked Central America. A specially equipped ship was obtained for the undertaking. Among the equipment was a side-scan sonar, satellite navigation, tele-operated deep-sea equipment (submersible with stereo camera and robotic arms) and computer modeling software, all of which helped to make the discovery possible.

The Central America is said to have settled upright. Since 1857, the Central America has been attacked by the forces of the deep sea. The iron works of her two coal-fired engines, boilers and other fixtures have partially disintegrated under the corrosive action of the salt water and her wooden hull has collapsed.

Thomas G. Thompson, a research scientist in the area of ocean science, headed the undertaking. He pointed out that in preparation for the undertaking, examination was made of hundreds of newspaper articles, statements by numbers of the some 160 survivors, and other information. Thompson said he spent some 13 years researching the historical and technical aspects of the shipwreck of the Central America. Correlation of the data of the survivors—eye witnesses—dealing with conflicts in the accounts and separating the facts from speculation was exceedingly difficult and time consuming. Commencing the search necessitated the development of probability search maps. This required a determination of the probable location of the sinking. Consideration had to be given to the accuracy of the navigational information available as to the probable location of the ship at the time of its sinking, to the quality of the information

furnished, to the normal prevailing currents, to what a hurricane does to the normal currents, to the movement of the ship as it begins to fill with water, to how the ship acts as it sinks, to the manner in which it sinks, and to how the information of action of the weather of that day fit into the advanced knowledge and skills of today. Models were created to try to determine drifting patterns and windblown currents and to try to determine how fast and how far a ship would drift under such conditions. Experts making use of these types of information prepared a probability map of where to search for the wrecked vessel. Too, study had to be made of what might be revealed by the sonar. Very little work like this had been done before. In the search, plainitiff found hundreds of what the experts called anomalies on the sea floor which had to be interpreted. They developed a computer process to assist them in undertaking the analysis of these anomalies. Upon analyses, a determination was then made of the most likely targets for the Central America. Many things affected what type of object appeared on the sonar. The sonar ability was much ahead of the interpretative skills. After one develops his or her best guess as to which image is the target he is looking for, it is then necessary to make a number of passes over the object, use video cameras, and to study the image and data in order to undertake to reach a better understanding. There is no set pattern to follow. One must determine what would be expected to remain of a ship which had been in that depth of water some 132 years. It is a new field in science. No one before has seen a ship that has been in that depth of water for that long a period of time.

It was after many hours and days of tedious research and study that plaintiff could determine the most likely targets. The first target thought to have been the Central America was not in fact it. It so happened that one of the earlier targets turned out to be the Central Amer-

ica. Only after re-examining the images in great detail, and location of the ship's bell, was plaintiff fully convinced it had located the famous wreck.

III.

HISTORY OF LITIGATION

As shown above, this admiralty action was commenced by complaint filed May 27, 1987. Plaintiff asserted this Court had *in rem* jurisdiction over the portion of the wreck found and brought within the jurisdiction of this Court and *in personam* jurisdiction over any potential claimants who made contacts with this forum; that the said wreck was wholly derelict and had been abandoned by the owners; that plaintiff is the owner of said wreck and has taken the necessary action to exercise complete and absolute dominion and control over it and is entitled to the exclusive possession of it, and to the protection of this Court; that in any event, it is entitled to a liberal salvage award; that plainitff is entitled to an injunction enjoining others from interfering with its recovery efforts; and it prays that a warrant of arrest issue, and the Marshal take into custody the artifacts, articles and such portions of the defendant wreck, cargo and artifacts as may be presented. In due time, a motion for a substitute custodian was filed.

On July 7, 1987, an amended complaint was filed enlarging the radius of the search area, an order for arrest was entered and directed to be executed, and a substitute custodian named. By that order, plaintiff was directed to, within 10 days after execution of the process, to cause public notice of the action and arrest to be given for not less than 5 consecutive days in the Virginian-Pilot, a daily newspaper published in Norfolk, Virginia, setting forth the docket number of the action, a general description of its nature, the fact of arrest, and requiring any person claiming any interest to file their claims and answers within 45 days. The warrant of arrest was issued

and executed July 7, 1987, following which the properties were turned over to the substitute custodian. Pursuant to motion, on July 9th, a temporary restraining order was issued restraining the R/V Liberty Star (Star), her master, officers, crew and all persons aboard, the Board of Trustees of Columbia University, Lamont-Doherty Geological Institute (Trustees), S.S. George Law Partnership (Law) and Boston Salvage Consultants, Inc. (Boston), from conducting salvage operations, photographing, entering or causing to enter on or above the surface within the designated boundaries as defined in the order. A cash bond of $100,000.00 was required and posted and a copy of the TRO duly served. A hearing was scheduled for July 16, 1987. On July 10th, a motion, with an incorporated supporting brief, was filed by Law, Trustees and Boston who appeared specially and moved to dismiss the TRO issued on July 9th for lack of jurisdiction, and to contest the award of exclusive salvage rights of plaintiff. The motion set forth that movants were involved in a deep water survey, search, identification and salvage operation in a section of the Atlantic Ocean approximately 160 nautical miles off the coast of Georgia believed to be the area in which a passenger vessel traveling from Havana to New York, known as the Central America, sank during a hurricane on Septemper 12, 1857; that from historical information and newspaper accounts, movants believe the vessel may have contained gold in significant quanties; that if they can locate and identify the vessel, they intend to salvage it for profit; that they have conducted the search operation by using a side scan sonar and a deep water tow fish with depressors capable of providing rapid and reliable information about the sea floor and features; that possible targets revealed by the sonar are investigated further by the use of underwater camera equipment, including real time video, still frame and ocean data censors; and that salvage operations will ultimately be effected by the use of a remotely operated vehicle capable

of handling the remains of a vessel and retrieving its contents. The motion continued by asserting "activities of George Law are being conducted in association with Columbia University . . . ." (p. 3 of Motion and Brief); that considerable funds have been expended and it is entitled to continue until it or a competing interest actually locates and salvages the vessel.

Following the hearing on July 16, 1987, the Court, by order filed July 17th, enlarged the TRO into a preliminary injunction. Notice of appeal was filed and a motion presented to one of the judges of the Forth [*sic*] Circuit Court of Appeals for a stay of the enforcement of the injunction. By opinion of that judge filed August 10th, the stay was denied. By motion of August 13th, 1987, the appellants moved to dismiss the appeal.

On August 20, 1987, S.S. George Law Limited Partnership and Boston Salvage Consultants, Inc. filed their answer herein denying the allegations of the amended complaint, and counterclaim. In their counterclaim, they asserted they were organized for the purpose of locating the wreck of the Central America and salvaging it, and that upon information and belief the plaintiff had abandoned their undertaking. Plaintiff responded and denied the allegations of the counterclaim. Subsequently, on December 18, 1987, upon joint motions of the parties, the answer and counterclaim of S.S. George Law and Boston Salvage were dismissed with prejudice.

On September 8, 1987, plaintiff moved the Court to hold Dana Leonard, Master of the M/L Cameron Seahorse, Steadfast Oceaneering, Inc., Zapata Gulf Marine Corp., South Carolina Marine Archeological Trust and Walter Kreisle in contempt of court for violation of the injunction order of July 17, 1987, and for entering or attempting to enter the restricted area. An order to show cause was issued. Following a hearing, the Court found the parties guilty of civil contempt, and ordered them not to release any information discovered in con-

nection with the violation of the injunction. Plaintiff thereafter sought to recover damages, costs and attorney's fees incurred as a result of said parties violating the injunction. By opinion of January 25, 1988, the Court, having found all of said parties in contempt, postponed the assessment of damages, costs and attorney's fees to give them an opportunity to purge themselves by no further violations of the injunction.

On March 23, 1989, a second amended complaint was duly filed, expanding the area to a radius of 50 miles, ordering arrest or seizure of artifacts, and appointing substitute custodian. Publication of notice of arrest was ordered for five consecutive days in the Virginian-Pilot, requiring claimant to file their claim within 10 days after process was executed and their answers within 20 days. The notice was duly published. On June 15, 1989, plaintiff filed a motion for award of title to all properties recovered. By order of August 18, 1989, adopting the findings of fact and conclusions of law filed June 30, 1989, the Court enlarged the preliminary injunction into a permanent injunction and ordered the release of the cash bond to plaintiff.

On August 30, 1989, plaintiff filed a third amended complaint setting out enlarged boundaries. The Court ordered arrest, and publishing of notice as in the previous order. By order of September 29, 1989, the answers of Atlantic Mutual Insurance Company and some 38 other companies were filed, asserting that by reason of payments made for losses, they were subrogated to the rights of the owners in the cargo of gold; that they were making claims on behalf of themselves and the account of the owners; and that they are the owners of said properties and entitled to possession thereof. On the same day, they filed an answer denying each of the allegations made by plaintiff in each count of their complaint.

On October 13, 1989, Dennis Standefer filed a claim asserting that pursuant to a contract with Thomas G.

Thompson, he was entitled to a share of any recovery made by Thompson from the Central America. On October 19, he filed an answer denying plaintiff was entitled to the full recovery and that he was entitled to a share of any recovery. Standefer also instituted a separate suit against Thompson, asserting he is entitled to recover a portion of any sum received by Thompson in this action. That action was thereafter merged with this suit. Because that claim was for alleged breach of contract and against Thompson, who is not a party to this suit, upon motion the Court dismissed the claim filed in this suit by Standefer, with right to file an amended claim within 10 days against plaintiff in this suit. By way of information, a motion of Thompson for summary judgment in C/A 89-753 has been granted and that suit dismissed.

A final pretrial order was entered in this action March 16, 1990. Among other things, it was stipulated:

(A) Plaintiff has been engaged in search and recovery of defendant wrecked and abandoned sailing vessel within the coordinates—(those of the 3rd amended complaint).

(B) The wreck is the remains of the S.S. Central America which sank September 12, 1857.

(C) Central America had not been successfully salvaged before commencement by plaintiff.

(D), (E) & (F) Plaintiff is an Ohio corporation which conducts deep ocean discovery and salvage, and has located and recovered items from the Central America shipwreck.

(G) The general location of the wreck is approximately 160 miles off the East Coast of United States in the Atlantic Ocean, about 1½ miles below the surface.

(H) & (I) Claimants were not the owners of the cargo prior to its sinking and have never marked the wreck or any of the cargo of the Central America.

(J) through (Q) London Assurance Association was established by Royal Charter in 1720; Alliance Assurance Company, Limited was established 1824; Atlantic Mutual Insurance Company was incorporated April 11, 1842 by the laws of New York, Royal Exchange Assurance by Royal Charter in England, The Indemnity Marine Assurance Company, Limited, July 4, 1824 in England, Marine Insurance Company Limited in England in 1836, and The Salvage Associates established in England in 1856 and incorporated by Royal Charter in 1867.

By order of March 29th, the Court dismissed some 21 of the named insurance company claimants with prejudice. Though agreeing to the dismissal, defendants desired dismissal without prejudice. The list of dismissals is shown in Appendix "A" hereto attached. By that same order, the Court directed claimants to file on the morning of trial a statement of their claims seting forth the name of the claimant, the name of the shipper, the insured, identification of the specific property shipped, the value of each shipment and the name and similar information as to each coinsurer as it relates to the cargo.

On March 29, and April 2, 1990, respectively, Harry G. John and Jack F. Grimm and the Trustees of Columbia University (Trustees) moved to intervene to assert a claim to any interest in any find or salvage, asserting they had furnished information to the plaintiff or that plaintiff had used information belonging to them. On their representation that they were ready to proceed with trial on April 3rd and to prove their claim, they were on April 3rd, 1990, over objection of plaintiff, permitted to intervene and their respective claims were ordered filed. They were further granted permission to add to the final pretrial order the names of witnesses and to list exhibits deemed necessary to prove their claims. Plaintiff was granted right to add lists of exhibits and names of witnesses in rebuttal of their claims. By order of April 3rd, 1990, the Court foreclosed the filing of any further

claims in this action. Trial commenced and the presentation of evidence was concluded on April 12th. Counsel requested and were granted the right to file briefs and argue the case orally on July 11th, 1990. A transcript of the argument and additional briefs were filed the end of July and the case submitted for decision.

By agreement with the parties, the Court was to determine (1) whether the artifacts and items recovered from the Central America were a find or whether the operation was a salvage, and (2) whether any party other than plaintiff established any right, title or interest in the items. If the Court determined the operation was not a find, then the Court would hold further hearings to determine and deal with the rights of the insurance companies.

IV.

Jurisdiction of the Court is not now an issue. A claim to title of lost property by occupancy "may be asserted in an *in rem* proceeding instituted once the goods have been recovered and brought to shore within the jurisdiction of the court." *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir.1981) (Salvors III). The law of maritime salvage and finds protects the rights of one who undertakes such a recovery project to carry it to completion without interference from others who seek to share in the enterprise and reward. *Id. See also Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 1989 A.M.C. 1955 (E.D. Va.1989). The *res*—or at least the greater portion of it—is within the jurisdiction of this Court. The Court has previously determined it had jurisdiction of the res and the subject matter of this suit. Those who sought to question it withdrew their appeal and dismissed their cause of action.[1] Such determination has therefore become the law of the case. No one since that time has

[1] Trustees were parties to the original action, but not to the appeal.

sought to raise the issue. The present claimants have submitted to the *in personam* jurisdiction of the Court.

Section 1333 of Title 28 U.S.C. grants federal courts jurisdiction of all cases involving admiralty or maritime claims. "The subject matter jurisdiction granted by this statute is not limited to causes of action arising from events or occurrences on the territorial waters of the United States." *Salvors III*, 640 F.2d at 566. "Claims arising out of . . . effort to recover ships disabled or abandoned at sea to retrieve their cargo . . . are unquestionably within the admiralty jurisdiction of the federal courts." *Id.* Hence, courts of the United States take jurisdiction "of suits on maritime claims arising out of transactions and occurrences anywhere in the world." Ch. 1, §§ 1-19, page 51, *The Law of Admiralty*, 2nd Ed.1925, Gilmore & Black. The above language was quoted with approval in *Salvors III*, 640 F.2d at 566-67.

A.

The law of admiralty is clear that a salvor has a valuable interest in his salvage, and "in extraordinary cases, such as this one, where the property has been lost or abandoned for a very long period . . . the maritime law of finds supplements the possessory interest normally granted to a salvor and vests title by occupancy in one who discovers such abandoned property and reduces it to possession." *Salvors III*, 640 F.2d 567. *See also Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, etc.*, 569 F.2d 330, 336 (5th Cir.1978) (*Salvors I*). The law "acts to afford protection to persons who actually endeavor to return lost or abandoned goods to society as an incentive to undertake such expensive and risky ventures . . . ." *Salvors III*, 640 F.2d 573.

A real issue here is whether salvage law or the adjunct law of finds should be applied. The insurance companies contend the law of salvage should be applied here,

while plaintiff contends the law of finds is the applicable law. The insurance companies rely upon the authority of M. Norris, *The Law of Salvage*, § 150 (1958), and cases following his theory. That theory is referred to in *Salvors I*. The opinion there makes it clear that courts "have rejected the theory that title to such property can never be lost and have applied the law of finds. *Wiggins v. 1100 Tons, More or Less of Italian Marble*, 186 F. Supp. 452, 456-57 (E.D.Va.1960). *See Nippon Shosen Kaisha, K.K. v. United States*, 238 F.Supp. 55, 59 (N.D. Cal.1964); *Rickard v. Pringle*, 293 F.Supp. 981, 984 (E.D.N.Y.1968)". *Salvors I*, 569 F.2d at 336-37. "Under this theory, title to abandoned property vests in the person who reduces the property to his or her possession." *Id.*

Norris, in his treatment on salvage, as do insurance companies here, suggests difficulties may be brought about by applying the law of finds rather than that of salvage. The Court in *Salvors I* dealt with this question and said it failed to see how the law of salvage would provide a more effective deterrent to a clash, as under find or salvage, an award goes to the one who is able to seize possession.

There are two considerations in determining whether property has been *lost* or *abandoned*. First, whether the location of the property is known, and second, even if its location was known, whether it has been abandoned.

"Lost" means not able to find, its whereabouts unknown, unable to locate, no longer possessed, removed from reach or attainment.

"Abandonment" means a yielding to natural impulses, to withdraw protection, support or claim; to desert; to cease intending or attempting to perform; to terminate possession or protection. "Abandonment includes both the intention and the external act by which the intention is carried into effect; intention may and indeed often

must be inferred from acts." *In re G.M.P. Land Co.*, 33 B.R. 729, 731 (1983); *Llewellyn v. Philadelphia and Reading C. and I. Co.*, 308 Pa. 497, 502, 162 A. 429 (1932). Whether there is abandonment is to be determined from "a consideration of the nature of the property and the conduct of the parties [plaintiff] in relation to it. *Russell v. Stratton*, 201 Pa. 277, 278, 50 A. 975 (1902)" *Id.* "Whether a sunken wreck has been abandoned is a question of fact." *Bunge Corporation v. Agri-Trans Corporation*, 542 F.Supp. 961, 969 (N.D.Miss. 1982), *aff'd* in part, vacated in part on other grounds, 721 F.2d 1005 (5th Cir.1983). Abandonment "may be accomplished by either an express or implied act of leaving or deserting the property without hope of recovering it and without the intention of returning to it." *Id. See also Chicago and North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311, 313, 101 S.Ct. 1124, 1128, n. 2, 67 L.Ed.2d 258; *Ellis v. Brown*, 177 F.2d 677 (6th Cir.1949).

"Whether property has been abandoned is a question of intent, which may be inferred from all of the relevant facts and circumstances. *United States v. Manning*, 440 F.2d 1105 (5th Cir.), *cert. denied*, 404 U.S. 837, 92 S.Ct. 125, 30 L.Ed.2d 69 (1971)". *United States v. Sylvester*, 848 F.2d 520, 525 (5th Cir.1988). Valid abandonment occurs "by an express or implied act of leaving or deserting property without hope of recovering it and without the intention of returning to it." 3A *Benedict on Admiralty* § 134 (7th Ed.1980); *Bunge, supra*, 542 F.Supp. at 969.

The difference between lost and abandoned property is that in the first instance it often is involuntary while in the second instance it is by intent and design. Abandonment is the voluntary relinquishment of a right. Clearly, personal property of all kinds may be abandoned by an owner with the view of divesting himself of title and ownership. In determining the question of whether

property has been abandoned, consideration must be given to the property, the time, place and circumstances, the actions and conduct of the parties, the opportunity or expectancy of recovery and all other facts and circumstances.

Plaintiff asserts that it is vested with absolute title to the properties in question under the law of finds. "Under this theory, title to abandoned property vests in the person who reduces that property to his or her possession." *Salvors I*, 569 F.2d at 337. There, in holding that the trial court had correctly applied the law of finds, the Court pointed out that "[D]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Id.*

The law of salvage for a number of years governed the location of recovery of ships and their cargo lost at sea. "Modern courts, however, have rejected the salvage law theory that title to property can never be lost. They have instead applied the law of finds under the doctrine of *animus revertendi* (the owner has no intention of returning)" (citations omitted). *Chance v. Certain Artifacts Found and Salvaged from the Nashville A/K/A The Rattlesnake, Her Engines, etc.*, 606 F.Supp. 801, 804 (S.D.Ga.1984), *aff'd* 775 F.2d 302 (11th Cir.1985). Thus, "in a first finder situation, the law of finds and salvage merge to give the first finder/salvor the sole possession of the property." *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, etc.*, 631 F.Supp. 308, 311 (S.D.Fla.1986). The common law of finds, and not maritime salvage law, was applied to determine ownership of a shipwreck even though within the confines of a national park and the territorial sea of the United States. *Klein v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985). In *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel*, 518 F.Supp. 816 (W.D.Tex.1981), the

Court, in dealing with an issue of whether the State had title to a found shipwreck said "if the State insists that it has title to the res, the Court could find that the State had abandoned the res (by never executing any contract or otherwise indicating possession of the res) and the finder of the abandoned property gets to keep the find. The Court in *Indian River Recovery Co. v. The China*, 645 F.Supp. 141 (D.Del.1986) applied the law of finds and pointed out that demonstration of possession and control of abandoned property is the prerequisite to an award of title under the law of finds. *See also Hener v. United States*, 525 F.Supp. 350, 356 (S.D.N.Y.1981).

In *Rickard*, cited above, the Court held that title to a propeller recovered from a vessel abandoned on the ocean floor for sixty years vested in the first finder lawfully and fairly appropriating it and reducing it to possession with the intention to become its owner.

In order to determine the ownership of a shipwreck on the outer continental shelf—outside the territorial waters of the United States—the Fifth and Eleventh Circuits relied on the law of finds instead of the maritime salvage law. The Court reasoned that because application of maritime salvage law was predicated on the fiction that the owner of the wrecked vessel was still in existence, it would be absurd to apply maritime salvage law to a vessel whose very location had been lost for centuries. Instead, "the Court held that title to abandoned property vests in the person who reduces that property to his or her possession, (citations omitted), [and] [T]he common law of finds is the appropriate law to examine to determine the ownership of the shipwreck." *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir.1985). "The common law of finds generally assigns ownership of the abandoned property without regard to where the property is found." *Id.* There are two exceptions, neither of which is applicable here.

In *Wiggins, supra,* the court sitting in admiralty held that the party who first finds and recovers derelict propperty at sea is entitled to full title. There, the ship had been sunk some 66 years. The Court held that even though lapse of time and non-use are not sufficient, in and of themselves, to constitute abandonment, under certain circumstances, they may give rise to an implication of intention to abandon. *See also* the following cases: *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F.2d 1059, 1065 (1st Cir.1987); *Commonwealth of Massachusetts v. Maritime Underwater Surveys, Inc.,* 1987 A.M.C. 2590, 2606 (Mass.1987), *aff'd* 1989 A.M.C. 425, 403 Mass. 501, 531 N.E.2d 549 (1988); *Cobb Coin Company, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, etc.,* 549 F.Supp. 540 (S.D. Fla.1982); *Eads v. Brazelton,* 22 Ark. 499, 79 Am. Dec. 88 (1861); *Deklyn v. Davis,* 1 Hopk. Ch. 135 (N.Y.1824); *Creevy v. Breedlove,* 12 La.Ann. 745 (1857); *State by Ervin v. Massachusetts Co.,* 95 So.2d 902 (Fla.1956), *cert. den.,* 355 U.S. 881, 78 S.Ct. 147, 2 L.Ed.2d 112 (1956); *Steinbraker v. Crouse,* 169 Md. 453, 182 A. 448 (1936); *Howard v. Sharlin,* 61 So.2d 181 (Fla.1952); *United States v. Smiley,* 6 Sawy. 640, F.Cas. No. 16317 (C.C. Cal. 1864); *Thompson v. United States,* 62 Ct.Cl. 516 (1926); *Wyman v. Hulburt,* 12 Ohio 81, 40 Am. Dec. 461 (Ohio 1843).

CLAIMS OF COLUMBIA UNIVERSITY AND JOHN AND GRIMM

On April 2nd, 1990, Columbia (Trustees) submitted a motion to intervene in this action. Trial had long before been scheduled to commence on April 3rd. Upon their agreement, they were ready to proceed without change of date for trial. They were permitted to intervene. In their claim filed on April 3rd, they set forth that since 1980, they had sought to locate and recover the wreck of the Central America; that in February

1984, Santa Fe Communications, Inc. (Santa Fe)[2] contracted with Trustees to map a twenty nautical square mile area of the Continental Margin of the Eastern United States encompassing the coordinates of 31 degrees 30 minutes North latitude, and 77 degrees West longitude in an effort to find the Central America; that such a search was made and the survey imaged several acoustic targets of man-made artifacts, only one of which was large enough or reflective enough to be echoes of the size of the Central America[3] that Thomas G. Thompson, the lead man of plaintiff's search in 1986 requested of Trustees information of the survey; and that Trustees furnished portions of the information from the survey to Thompson. Trustees contend that the information furnished lead [*sic*] plaintiff to the location of the Central America. Trustees further assert that they were among those enjoined by the Court by the injunction order of July 17, 1987, from searching in the area where plaintiff was searching, and that two weeks previous to filing their claim, they learned that plaintiff had expanded the area of its search. Trustees assert that by reason of their survey of 1984, they have an ownership interest in the wreck or claim to any recovery, and they are entitled to a liberal award for their services.

Harry G. John and Jack F. Grimm, like Trustees, on April 3rd, 1990, the day the trial of this suit commenced, sought to and were permitted to intervene. They assert that John is the successor in interest to Santa Fe; that since 1984 they have sought to locate and recover the Central America; and that John, as President of Santa Fe, contracted with Trustees in 1984 to have Trustees map the area described above in Trustees' claim. The

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[2] The claim of John and Grimm, as does Trustees, grows out of the activity conducted by Trustees for Santa Fe from whom John and Grimm obtained an assignment.

[3] Bishop's investigation, hereafter dealt with, disagrees with this contention, as do plaintiff and others.

remainder of the allegations of their claim are about the same as those of Trustees.

In December 1984, Santa Fe assigned all of its right, title and interest in its properties, information or claims relative to or arising out of any attempted salvage of the Central America to the Province of St. Joseph of the Capuchin Order—St. Benedict Friary of Milwaukee, Wisconsin (St. Joseph). Sometime in early 1990, John obtained an assignment back from St. Joseph. Grimm is a party because of some arrangement he had with Santa Fe to share equally with Santa Fe in any recovery from the Central America. Since the filing of the claim by John and Grimm, St. Joseph has obtained an agreement between John and Grimm to pay over to it a portion of any sums they may recover.

While there is much evidence concerning the dealings between John, Santa Fe and St. Joseph, most of it has little or nothing to do with the issues before the Court of whether Santa Fe or John Grimm have any right to share in any recovery by plaintiff.

A.

In the early 1980's Thomas Thompson was doing research on information relative to a possible salvage of the Central America and putting together a group to finance such an undertaking. John was a person interested in such an undertaking and had discussions with Thompson. John requested Thompson to obtain information for him. In the negotiations, Thompson made suggestions of what services might be obtained for such an undertaking. On December 12, 1983, Thompson wrote John enclosing a prospectus from a charter company to provide a "Sea Marc Deepsea Survey System," [Plaintiff's exhibit 439 [4]], as prepared by Williamson & Associates, a firm headed by M.E. Williamson. The prospectus gave information about personnel available and their

[4] Hereafter plaintiff's exhibits will be referred to by number only.

qualifications. It also gave a brief description of the capabilities of the Sea Marc I and II and made reference to the equipment of Lamonte-Dougherty Geological Observatory, a unit of Columbia University (Trustees). It pointed out that it was the policy of Trustees to make public the data obtained by work done by them. However, Thompson was not employed for the survey. Exhibit 432 is a proposal submitted to John on behalf of Santa Fe by Trustees, dated February 14, 1984, for a Sea Beam Mapping of Continental Margin in Vicinity of 30 degrees 30 minutes North and 77 degrees West. Among other provisions, the agreement between Santa Fe and Trustees provided (1) Trustees would be free to publish the results of the research, without restrictions, one year after termination of the contract, and (2) Santa Fe could send personnel to examine the progress of the work, and from time to time, require a more detailed search of a particular area. Santa Fe in fact did have aboard the survey ship some three persons to observe the work. The contract was to terminate September 30th, 1984. The contract was reviewed for Santa Fe by its counsel who reported on the terms and made certain recommendations. Among other things, counsel pointed out that Trustees reserved the right to publish any information obtained, and in Exhibit 440, on page 2 of the attachment, "suggested the possibility that even likely locations . . . would be made known to the world . . . [and because] John . . . has no control over dissemination, someone else might . . . be able to put together a project using this information before Mr. John can do so himself." Later in the letter it suggested there should be provisions for immediate reporting to Santa Fe of any likely or suggested target, so that it might at that moment be further pursued. Again on the third page, it called attention to the danger of permitting publication. A change was made in the contract to restrict publication for one year from completion of the contract. Upon completion of the survey, Trustees made a report to Santa Fe.

Exhibit 445 is a memo from Captain O'Connell to John dated April 25, 1984, relative to the Central America for an operation in July, on certain targets, some or all of which were apparently those reported in the Trustees' survey. O'Connell said that 8 of the 11 targets were good possibilties. However, John did not undertake this operation, and nothing came of this contact.

Sometime in early 1986, Thompson contacted Dr. Ryan at Columbia relative to the survey it had made for Santa Fe and asked to be furnished certain information from it. He wrote Dr. Ryan on February 12, 1986 saying that pursuant to his telephone conversation of that day, he would like to have copies of the some 20 8 $\times$ 10 negatives of the sonar record done by Sea Marc in the February 1984 survey; that he was submitting the order primarily out of personal interest, and he had a personal source of funds available for such collection and correlation; that Ryan should bill him personally for up to $250.00 for the material; and to send them to his (Thompson's) home address which he set out in the letter. (Trustees' Exhibit 2)

By letter of March 19, 1986, (Trustees' Exhibit 3) the Division Administrator of Trustees reported to Thompson that pursuant to request to Dr. Ryan, they were preparing to make contact prints of the contour map. The letter pointed out that since the data was not in the public domain and Trustees would not release the right to publication until students who were working on the data compiled and published their dissertations, "we would require your agreement that any photo-copied records or computer tapes you receive would be for your sole use and would not be reproduced for others." Thompson agreed. The parties agreed that the photos sent to Thompson were merely an index to the tapes of the survey. On April 1, 1986, Dr. Ryan wrote Thompson that the photos had been sent that he could provide the tapes at a cost of $1,732.00. In that letter, Dr. Ryan

set out the exact language as that set out in the above letter from the Division Administrator of March 19, 1986, prohibiting reproduction. Thompson paid the $250.00 and declined to obtain the tapes.

Trustees now contend that plaintiff used the information in the photos which they furnished Thompson in his efforts to locate the Central America and therefore they are entitled to share in any recovery plaintiff may make. Trustees agree that if plaintiff did not use the information which Dr. Ryan sent to Thompson, then they have no claim and are not entitled to any portion of a recovery by plaintiff. The claim of John and Grimm is grounded in the same contention that plaintiff made use of information from the Santa Fe survey which Ryan sent to him.

Plaintiff asserts that Trustees and John and Grimm have no claim, and are not entitled to any portion of any recovery made by it.

First, as to Trustees, plaintiff says the photos sent by Dr. Ryan to Thompson were of no value to Thompson or plaintiff, and were not used by Thompson or plaintiff in the search for and location of the Central America. Further, plaintiff says that Trustees had no saleable or otherwise valuable property interest in the information from the survey and that their only interest was the right to publish it after one year from the date of the contract. Plaintiff asserts that Trustees contracted to make the survey for Santa Fe and furnish Santa Fe a report and that they were paid in full the market price for the work and the survey was the property of Santa Fe. Further, plaintiff asserts that Thompson paid the requested fee for the photographs, and that they were furnished with no restriction except that they would not be "reproduced for others."

It is asking too much to believe that if Thompson had a likely target of the Central America and he could ob-

tain the details of the location for $1,750.00, that he would not pay that sum rather than be confronted with searching in the dark for it at a cost of $20,000.00 per day, the daily cost to operate the search vessel.

As to the claim of John and Grimm, their claim will also fail unless it is shown plaintiff used the information from the survey. Too, since Trustees reserved the right to publish this information after one year from the date of the termination of the contract, i.e., one year from September 20, 1984, and the information was not furnished until March 1986, plaintiff says John and Grimm's claim must fail. Neither John nor Grimm assert they had any contact with plaintiff or Thompson relative to the survey or a request for information, nor do they or Trustees contend there was any contractual arrangements with Thompson or plaintiff other than the restriction in the letter for reproducing the photos.

Trustees make much of the contention that they thought they were furnishing the information to Battelle Laboratories, where Thompson worked; that it was the custom for laboratories to share data; and he (Ryan) thought he was furnishing the information to the Battelle Laboratory for its study and use. In fact, Dr. Ryan stated under oath that on or about April 1986, Columbia sent copies of the sonar imagery including the imagery of the Central America wreck site to "Battelle Columbus Labortory upon Thompson's representation that said material was for its sole use and would not be produced for others." (Tr., p. 1458) He admitted on the witness stand that the information—photos—were not sent to Battelle Laboratories, but were sent to Thompson personally at Thompson's home for his sole personal use and that they were paid for by Thompson personally and he was in error when he made the statement under oath as set out above. Not only did he admit it, but the exhibits fully show this to be a fact.

Trustees now make the contention that the survey of 1984 showed a target of the Central America, and that it was of great value to plaintiff, for which they are entitled to share in any recovery made by plaintiff. However, in Trustees' report to Santa Fe at the conclusion of the 1984 survey, reference was made to one object which the report said was a good candidate as a target for the Central America.

First, Trustees, and John and Grimm, must show that plaintiff made use of the information. They admit that if plaintiff did not use it, they have no claim. Even if they prove plaintiff did use the information, they must show that the target was the Central America or that the information lead to or assisted in locating the Central America. They have not proved either of these contentions, nor offered any credible evidence to establish such facts, and unless the Court is to indulge in speculation, conjecture, supposition or guess, there is no credible evidence in the record to establish either of these as a fact. Thompson stated clearly and without reservation that no use was made of the information furnished and there is no credible evidence in the record to suggest otherwise. The Court accepts the testimony of Thompson as an established fact. A consideration of all of the evidence supports this finding. The uncontradicted testimony establishes that commencing in 1986, and through 1987, plaintiff located several targets which might be the Central America. One in particular was an excellent candidate. A second target was located which was a spendid candidate. In 1987, they were of the opinion the second target was a prime candidate. An injunction was obtained. Upon return to sea in 1988, after further review of the sonar targets, plaintiff decided the "excellent candidate" was the target to pursue. Plaintiff decided to return to the target located in 1986 and do further investigation. They discovered side wheels, and then located the bell, which convinced plaintiff it had located the

Central America. After recovery of other items, it applied to the Court for an enlargement of the injunction box.

Plaintiff argues that neither Santa Fe nor Trustees had any faith in the fact any target it located was likely the Central America. Neither Santa Fe nor Trustees sought to pursue their targets further. Santa Fe had three representatives aboard the ship during the survey. They had authority to require the ship to make a more thorough investigation of any target. It is difficult to believe that if the target set off such a "hissing" sound, as Dr. Ryan says it did, that a more thorough investigation was not then immediately done. The cost of the survey was some $300,000.00. To assemble another survey to check out the target would have been expensive. While John may have thereafter contemplated further surveys and investigation, neither John nor Trustees went back to that target or, if they did, they have failed to say so.

It seems even more unusual that in 1987, when the Court enjoined Boston Salvage, Law, Trustees and Liberty Star from attempting to interfere with plaintiff's exploration within the area defined in the injunction order, Trustees made no contention it had furnished the information of a likely target to Thompson. Moreover, even though Trustees and the others were enjoined from searching in the area of the injunction box, they were not enjoined from searching elsewhere, and inasmuch as they were not enjoined from searching elsewhere, and even though they contend the target shown in the Santa Fe survey was the Central America, and it was not within the injunction box of the 1987 Order, they at that time did not further investigate the Santa Fe survey target.

It is not expected that a lay person could have examined the information furnished by Trustees to Thompson and been able to make heads or tails out of it. Nor

should or could it be expected that a person with expertise could have examined the photographs furnished, without more, and have been able to go to the location of the object. Thompson testified that some of the arrows which were supposed to identify objects appeared to be only dust spots, and other little blimps were difficult to characterize; that they did not have dimensions on them and there was not enough information to affect his interest one way or another; that when he saw the information, he decided it was of no value and getting the digital data would be of no assistance or value.

The testimony of expert Bishop—one extremely qualified in dealing with sonar and sonar maps—reviewed the charts from the 1984 Santa Fe survey. He did so for Captain Searle who was trying to set up an expedition with John relative to a search for the Central America. He was of the opinion target 4 (the one Dr. Ryan says fit the description of the Central America) was not even a likely target. He picked out target number 3 as a possible candidate. Captain Searle is a retired Navy Captain, an ocean explorer and had served most of his 28 years in salvage, five years of which he served as Navy's Chief Salvage Officer. He was employed by Santa Fe to evaluate the Santa Fe survey of 1984. He visited Dr. Ryan in February 1986, and wrote a memo of his conversation with Dr. Ryan, from which he testified. On the visit, Dr. Ryan showed him the data package of the 1984 survey and what had been found. He said Dr. Ryan indicated there hadn't been any contacts found as a consequence of the survey, and that he specifically asked him "if they found anything worthy of going back and going over it again or taking photographs, and he said, no, they hadn't and he specifically said they had photographic equipment on board and they hadn't gotten it wet." (Searle Dep. p. 11) His opinion confirms Thompson's decision that the information furnished by Trustees was of no use or value. In fact, as Dr. Ryan said, the

photos were only an index, but even assuming one could locate objects shown, it would make no difference here, for Thompson said that when he looked at the materials furnished, he determined they were of no value, and he made no use of the information.

Trustees, and John and Grimm, have failed to establish their claim or any right to share in any recovery by plaintiff or of Thompson. First, they have failed to establish (1) that they furnished information that assisted or could have assisted in the location of the Central America; (2) that plaintiff and/or Thompson used any information furnished; (3) even if the information was of value and was used, that any such use would entitle them to share in any recovery. Their claims are therefore DISMISSED.

V.

This action has been pending since May of 1987. Plaintiff has, by action in this Court, enjoined and fought off two separate groups who sought to interfere with their efforts to recover and reduce to its possession the remains of the Central America and its cargo. By direction of Order of this Court of July 7, 1987, notice was timely given in this action to anyone claiming any interest or right to appear and assert such right or claim. By findings of fact filed June 30, 1989, the Court found that when the Central America was located by the plaintiff, it was in international waters, and in an abandoned and derelict condition; that plaintiff had exercised dominion and control over the wreck and reduced it to its possession; that it was in the process of recovering the artifacts and things of value; and that it was entitled to possession and full and exclusive ownership thereof.

On September 29, 1989, the Atlantic Mutual Insurance Company and some 37 other insurance companies appeared and, by leave of Court, filed their claims to all items of gold recovered from the Central America. They asserted

that they had insured the commercial shipments of gold carried aboard the Central America, had paid the shippers for their loss, and were subrogated to the rights of the shippers. The insurance companies assert that it was common knowledge that regular shipments of gold were made from California to New York by way of Panana; that such shipments were insured; that some of the shippers advertised that their shipments were insured; and that there is ample evidence in the record to establish that commercial shipments were often, if not generally, covered by insurance. Reports of the sinking of the Central America from numerous newspaper accounts set forth that some shipments of gold aboard the Central America were insured and that some insurance companies paid certain of the losses. Insurance Companies rely solely upon the newspaper accounts for evidence that they were insurers, the name of the Insured, the amount of insurance, the value of the shipment, whether a claim was made, what sum was supposedly paid, and to whom. They well must rely on the newspaper articles for they have no copies of any insurance policies, invoices for shipments, proof of loss, amounts paid or other records. Without the newspaper accounts, the evidence is totally insufficient to establish any claim of the insurance companies.

Plaintiff asserts that newspaper accounts and other evidence shows that only a portion of the commercial gold aboard the Central America was insured; that considerable amounts of gold were carried by passengers, some of which was deposited with the Purser and some kept on their person or with their baggage and personal effects; and that the record of deposits with the Purser went down with the ship.

Insurers contend that they insured and paid for loss of $1,219,189.00, and that of this sum the London insurance companies paid $766,666.00 and the American companies paid $452.523.00. They further assert that according to the New York Times of Monday, October 5, 1857, the

"Sonora" (a passenger ship operating on the West Coast) carried pasengers and shipments of gold from San Francisco to Panama of $1,595,497.13, and that $271,000.00 of this amount was shipped by West India mail steamer from Aspenwald [*sic*] direct to England, "leaving a balance of $1,324,497.13 in treasure probably lost on board the Central America." (Ap. III Claimants' Post Argument Memorandum) However, plaintiff points out that other articles of the newspapers reported that a shipment of some $400,000.00 was off-loaded at Havana, and numerous of the reports stated the gold aboard the Central America exceeded $2,000,000.00. To say that there are numerous conflicts in the newspaper accounts and reports is conservative.

A.

First, the Court must consider whether the newspaper accounts are subject to the hearsay objection raised at trial.

Rule 802 of the Federal Rules of Evidence provides:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by act of Congress.

Rule 803 of said rules provides:

> That the following are not excluded by the hearsay rule
>
> (16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

In a discussion of the admissibility of hearsay, we begin with the established principle that cross-examination is of vital importance in establishing the value and trustworthiness of such evidence. The requirement the witness be sworn, testify in the presence and hearing of the trier and be subject to cross examination is lost in most instances of hearsay. The restriction in the admissibility of

ancient documents is "the authenticity of which is established." The purpose of the admission and exactly what is sought to be established by the item will often determine its admissibility. For instance, in *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961), a 58 year old newspaper story was admitted to prove the occurrence of a fire in a public building. However, the same Court in *Poretto v. United States*, 196 F.2d 392, 395 (5th Cir.1952) ruled that newspaper articles are not admissible to prove facts stated therein. In *Montana Power Co. v. Federal Power Commission*, 185 F.2d 491 (D.C.Cir.1950), *cert. denied*, 340 U.S. 947, 71 S.Ct. 532, 95 L.Ed. 683, old newspaper accounts on the question of navigability of the Mississippi River during the 19th century were admitted to prove navigability at that earlier date. The question often arises as to whether assertive statements in the article are admissible. In *Wathen v. United States*, 527 F.2d 1191, 1199 (Ct.Cl.1975), the Court in considering a newspaper account of a shooting, held it hearsay, but said "that insofar as they reported the fact of the shooting, resulting in death observed by witnesses, they provided reliable and substantial evidence."

In 55 ALR3d 663, a number of cases are collected dealing with the admissibility of newspaper articles in evidence. From a consideration of the cases there cited, and the case law generally as they apply the rule, the consensus of opinion seems to be that the articles are admissible for specific purposes, such as to prove the time, place and happening of the event and general information of it. There are some restrictions on the admissibility of such articles to prove the truth of certain statements or the truth of their content. Matters of public interest, where the facts are generally known throughout the community or nation, reported in numerous newspapers and re-reported over a period of time may be a much better account of the truth than what an eye witness may remember years after the event.

Even if there be restrictions on the use of newspaper articles that are admitted in evidence, where they deal with such an event as the sinking of the Central America, they are admissible as an ancient document. The weight to be given the articles is to be determined from all of the facts and circumstances in the case, giving consideration to what is sought to be proven by the articles. That is, where the articles meet the ancient document rule, they are generally admissible and any further question usually goes to the weight of the evidence. *United States v. Koziy*, 728 F.2d 1314 (11th Cir.1984), *cert. denied*, 469 U.S. 835, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984). *See also Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir.1984).

B.

Before dealing with some of the issues raised by each of the parties, the Court should deal with the issue of whether the location of the Central America and the items removed from it are a find or whether the result of the labors of the plaintiff are salvage. The parties agree that as between plaintiff and the insurance company the issue is whether under the facts of this case the ship and its cargo were abandoned. If it had been abandoned, then insurance claimants have no right to any part of any recovery.

There can be no doubt of the fact that the Central America was lost and its location not known.[5] Until located by plaintiff, no one claimed to have seen anything to resemble it after September 1857, the time of its sinking. Nor has anyone (other than plaintiff) come forward with information or a map of its location. For a number of years before it was located by plaintiff, many had done studies, research and attempted to locate it with the idea and purpose of reaping the reward of such a recovery.

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[5] Claimants cannot suggest the vessel was not lost, for they have sought throughout this proceeding to compel the plaintiff to reveal the exact location of the wreck and how they located it.

There were many newspaper articles written about the sinking back in 1857. Beyond these, information was scarce. To assemble the necessary information and equipment to attempt a search for the Central America required the expenditure of many hours of research and study. It was not a job or undertaking for a person of only ordinary skill. It required expertise in many fields and the assembling of numerous types of experts. Mr. Thompson said he did research on the Central America for some thirteen years. Research for this, and other sunken vessels, had previously been undertaken and proven costly and without success. Unusual knowledge of the Atlantic Ocean and of such an undertaking was a requirement. Any degree of success hinged on many contingencies such as equipment, personnel, weather, timing, condition and depth of the water, financing, ability of equipment to perform, and so on. Attempting recovery from water of such depth was new. So far as shown by the evidence, no one had ever before sought to search for and recover a wooden ship in such depth of water. Nor did anyone have much knowledge or information of what effect the water, tides, currents and other things would have done to a wooden vessel sunk some 132 years before. What would one really expect to see and find in such a search?

As shown above, "abandonment" includes both the intention and the external act by which the intention is carried into effect. Intention often may and must be inferred from acts or failure to act. "Whether a sunken wreck has been abandoned is a question of fact." *Bunge, supra.* What one says or does, or fails to say or do, often esablishes intention. Clearly, it can and most often must, be proved by circumstantial evidence.

Some 39 insurance companies attempt to assert the rights of ownership to the cargo of gold aboard the Central America. That number was later reduced to some eleven and the Salvage Association which attempt to assert the claim of two companies that no longer exist. The same

is true of the Superintendent of Insurance for the State of New York who attempts to assert a claim on two defunct companies. As shown by the chart submitted by the insurance companies, only one of the companies in America has a claim for as much as $150,000.00. The next highest is $98,356.00 and two of them have claims for only $31,250.00. The division among the London companies was somewhat different.

The evidence establishes that in 1858, Atlantic Mutual Insurance Company, the American company with the largest claim, and Sun Mutual Insurance Company, whose claim was $79,169.00, entered into a salvage contract with Brutus Villeroi dated July 28, 1858, for an attempted salvage of the gold from the Central America. The undertaking was to be by means of Villeroi's invention of a submarine boat at his own expense. The agreement provided the insurance companies would advance no funds, and under no circumstances were insurance companies to incur any expense or liability in connection with the attempted salvage. Nothing ever came of that undertaking. The record is totally void of any effort or activity on the part of any of the insurance companies to attempt to locate or recover the Central America. In fact, until 1979, there is no evidence of any contract between insurance companies and anyone relating to any interest in or any attempt to locate or recover the Central America. That contract is hereafter referred to. Insurance companies rely solely on the newspaper articles for the amount of insurance coverage, claims presented and payments made. Those articles indicate that the insurance companies stated they would pay the amounts of insurance due upon presentation of proper proof. The evidence established that the ordinary commercial transaction consisted of four documents which represent and take the place of the goods themselves in the financing of the transaction in past, current and all the markets of the world. They are (1) the invoice, the merchant's bill for the goods, (2) the Bill of Lading, the

carrier's receipt for the goods, (3) Draft or Bill of Exchange, the merchant's payment, and (4) Insurance Certificate, the document of guarantee. The Bill of Lading describes the package, not the contents. The expert witness explained the transaction by saying the merchant takes his invoice, obtains the Bill of Lading and insurance certificate, draws a draft on the purchaser, encloses the draft with the other three documents attached and presents this to his banker who puts the draft in process of collection. Hence, the proper proof required by an underwriter are the original bill of lading, the invoice, packing list if there was one, the insurance policy (or knowledge of its existence), and proof the goods were actually on board at time of sinking.

In this case, the insurance carriers have not been able to present an invoice, bill of lading, packing list, insurance certificate, statement from shipper that the goods were on board at time of sinking, cancelled checks or receipts showing payment of the claims or any other substantial documents or proof of their claims. Inasmuch as the news articles reported the insurance carriers had said they would pay the losses upon presentation of proper proof, and later news articles say claims were paid, it can be assumed the aforesaid documents or sufficient ones were obtained and presented. There were reports documents came by later shipments and that others were obtained from California, the point of origin for the lost shipment of gold.

The insurance carriers destroyed their records relating to the events of the Central America. Exactly when is not shown, but evidence establishes it was their custom to keep records for some five year periods, and thereafter destroy them. However, one expert on marine insurance testified that if a company intended to assert its right to subrogation, it always maintained its documents of proof of the claim and that it had paid the claim, and the fact it

disposed of such documents was an indication it abandoned its claim. It is difficult to believe that a company claiming an asset or property worth $150,000.00 in the 1800's or even early 1900's would destroy all evidence of its claim if it had any intention to pursue it, or any hope of recovery. How could one better demonstrate their intention to abandon a claim to or interest in property than to intentionally destroy every evidence of its claim, right or title thereto. It seems more than unusual that some eleven or more companies who have proof of what they say is an asset—or claim—and which they say they never abandoned, each destroyed all documents which established their right to the claim. None say they accidentally destroyed or lost the documents. They deliberately destroyed every document that would in anyway show they had an interest in such a claim and had any intention to pursue it. Why? Their actions speak clearly. They had no hope or idea they could locate the Central America, and even if they located it, they had no hope they could recover anything from it. They destroyed the documents and intended thereby to abandon any claim they might have. Such action was guided by the decision that location of the wreck was next to impossible; but, even if located, recovering it was beyond the ability of any known means. Not only was this true in 1857, and five years thereafter, but continued to be true for some one hundred years thereafter. But even after scientific means of locating ship wrecks and possible recovery in deep water became known some twenty or more years prior to the actions of the plaintiff in this case, still not one of the insurance companies undertook to locate or recover the Central America. The inaction did not stop there. The record is void of any evidence that even up to this day any one of the insurance companies ever sought to locate or have a discovery company or group undertake to locate and recover the Central America. Even in 1979 when a group was discussing or planning a search for the Central America, there is no

evidence any one of the insurance companies offered to join or assist them. The same continued through 1987 when Boston and Law undertook to have INA become a party to a search. Even the Salvage Association has offered no evidence of any action on its part to locate and find the Central America. This is true to this date even though there is substantial evidence that means of locating and recoverying wrecks in deep water has been in use for more than twenty years. Even so, not one of the insurance companies have even sought to contact any company or group with the idea of searching for or locating the Central America. The Salvage Association in London asserts it has been in existence for more than a hundred years for the purpose of salvaging shipwrecks, yet it has never undertaken to locate or recover the Central America, or have someone do so. Nor is there evidence any of the insurance companies or the Salvage Association ever made any inquiry of the availability of means or equipment to locate the Central America or undertake a recovery of it.

Even so, insurance companies now assert they never abandoned or ever intended to abandon their claim to the gold aboard the Central America. They ground their position in the contention they never signed any document so stating, never made any public announcement of abandonment and have always claimed to own the gold. But their actions—and failure of actions—speak louder than words. Only once—and that was less than a year after the loss—did they even evidence any interest in an attempted recovery, and even then refused to offer financial or any other type of assistance to that recovery group. When is not known, but they deliberately destroyed all documents that would establish they had any interest in the cargo—even failing to retain a cancelled check or receipt for payment. The destruction of their records confirms the fact they abandoned any intention to retain any interest in the gold. The insurers own evidence indicates they always

retain documents as long as they believe they have an interest in any subrogated items. If there had been any intention not to abandon any thought or hope of recovery, it would seem that at least one of the insurers would have kept its records of their loss. However, the evidence establishes they did keep some records of their company for more than 100 years, but not of any claim to the Central America.

The Salvage Company attempts to assert a claim on behalf of two defunct companies, as does the Superintendent of Insurance of the State of New York. However, neither of them assert that at the time each of those companies failed or ceased business, there was listed as an asset or claim any right of subrogation to an interest in the cargo of gold abroad the Central America. Why? They had no such claim. Any claim they may have ever had was previously abandoned. If it had not been previously abandoned, it surely was at that time.

In the past ten years, several groups were making a search for the lost Central America. Considerable publicity was given to these searches. Even after much publicity was given to the plaintiff's location and commencement of recovery from the Central America, not until September 1989 did insurers attempt to assert a claim.

While time alone may not be sufficient to establish abandonment, it is an element to be considered and when considered with all of the other evidence, it has convincing power. Once the insurance companies abandoned the Ceneral America, whether it was because of lack of means or lack of hope for recovery, the abandonment was final. Merely because means are thereafter found to locate and recover it does not reinvest ownership in them. To now suggest that in 1859 or anytime up until World War II, that an insurance executive had any intention of claiming gold located one and one-half miles below the surface of the sea, and any hope of being able to locate such an

object and recover it, by saying it was property of his insurance company is stretching common sense too far. Here, the Court is asked to assume this when that very insurance executive destroyed every evidence which his company had to such a claim. It is exceedingly doubtful that any of the now claiming insurance executives had any knowledge that their company ever had such a claim until commencement of this action. If they had such knowledge, they never gave any indication such a claim was viable and had not been abandoned. If there is any executive, or anyone with any of insurer claimants, who ever heard his predecessor of the company indicate the company had a claim to any of the gold on board the Central America, he has not come forward with it. It is easy for present day persons to assert they did not and would not abandon a claim to gold in a shipwreck, knowing now the modern means for recovery—but they have not, and could not, say what their predecessors did or intended. Again, the actions—and failure to act—speak loudly.

During much of the middle and late 1800's and early 1900's, capital assets of corporations were assessed for taxes. That is, each item of real and personal property was to be valued. Hence, any personal property, gold, silver and so forth had to be reported. *See Jenkins v. Neff*, 163 N.Y. 320, 57 N.E. 408 (1900); *People v. Barker*, 144 N.Y. 94, 39 N.E. 13 (1894). Many states had similar laws. There is no suggestion that any one of the insurance companies ever listed as an asset, or as its property, any of the gold or a subrogation claim to any such gold.

In 1979, one Norman Scott of Expeditions Unlimited had some contacts with counsel for INA relative to an expedition to attempt to locate and recover items from the Central America. In a letter of April 16, 1980, Scott asserted that a group from Orlando, Florida had funded an attempt to locate the Central America. He said they had found a ship which might well be the Central Amer-

ica and they had returned to the site three or four times in attempts to make such determination, but attempts had not established it was or was not the Central America. He points out that if the ship is in two to three thousand feet of water, the cost of recovery will exceed one million dollars. He suggested that if private funding did not come forward, the insurance companies should contribute to the cost of the search. Nothing further seems to have come of that discussion, nor is there any evidence the insurance companies showed or took any interest in the undertaking. By letter of November 4, 1987, counsel for S.S. George Law Limited Partnership and Boston Salvage Consultants, Inc. sought the cooperation and assistance of INA in an effort to locate and recover the Central America. Attached to that letter was a requested sale and transfer by INA to Law and Boston of any rights which INA had in the Central America for the consideration of 2% of the net proceeds from any recovery of the Central America. The project was not to cost INA anything. The assignment said the Central America was lying 200 miles off the coast of Georgia. The letter set forth that Law and Boston wanted the assignment because they thought it was in their interest to appear in an action pending in Norfolk, Virginia, (which was this suit), as a claimant of the vessel and cargo. INA did not sign the document. However, Law and Boston did appear in this litigation in 1987, to oppose plaintiff's application for the injunction. Thereafter, they dismissed their claim. Hence, as early as July 1987, INA knew there was litigation relative to the Central America and possible claims, yet neither it nor any of the other insurance companies appeared or sought to assert any right, title or interest in the Central America.

Insurers, on one hand, assert they were subrogated to the title and ownership of all of the gold aboard the Central America. On the other hand, they admit there were persons aboard who were carrying substantial amounts of gold with them which was not insured. Hence, even if

insurers did not abandon their claim or title to the insured gold, and were fully subrogated to the rights of the shippers, they have no standing to claim all of the gold aboard. Numerous news reports gave the names of individuals aboard who were carrying substantial quantities of gold. One of the experts testified that between three hundred thousand and a million dollars was carried by passengers; that small amounts were carried on the person [6], larger amounts carried in carpet bags, large bags and trunks, and some individuals deposited their gold with the Purser. Too, the expert testified one commercial shipper did not insure his gold. The expert for the insurance companies also testified that reports of personal gold were as high as $400,000.00. He likewise confirmed much of the testimony of the plaintiff's expert.

Clearly, there were substantial sums of gold aboard the Central America other than the sums covered by insurance. Accounts fix the quantity of gold on board and going down with the ship as between one million, six hundred thousand up to two million dollars. Insurers do not contend they insured such a quantity and now agree that they did not insure all of the gold aboard.

The news accounts list Lloyd's of London as one of the insurers. It is made up of in excess of one thousand individuals. None of them has appeared to assert a claim. Too, some of the insurance companies have ceased to exist. The Salvage Company asserts it is the successor to those from London, but there is no proper document assigning any such claim. Even if the insurance companies did not abandon their claims, they would not be entitled to the total gold recovered. Too, there is no credible record of the exact composition of each shipment, whether bars, coin, dust or otherwise. More than likely, there will be no recovery of any gold dust.

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[6] There were one or two newspaper accounts of passengers carrying from two to ten thousand dollars in money belts, and one had 20 thousand in a carpet bag.

Insurers say that insurance companies do not abandon cargo worth $150,000.00. It is true that few companies or individuals would abandon claims for such a sum, if there was any hope or likelihood of locating and recovering such cargo. Equally as true is the fact that if the company ever had any intention or hope of asserting or pursuing a claim to such cargo, it would certainly not have destroyed all evidence of its claim or right thereof. However, where the whereabouts of the property is unknown, and there is no known way to locate or reach it or if the cost of attempted recovery exceeds the value, the situation changes. The attitude and intentions of business people are expected to be, and generally are, rational. They don't hold on to a claim when it is impossible to recover it or where it has no value. A clear intention of abandonment is given when all records or memorandum of the property are deliberately destroyed and no effort is made or undertaken to locate or recover the property for over a hundred years.

Considering all of the facts and circumstances in the case, the Court is satisfied that plaintiff has carried its burden of establishing by clear and convincing evidence that each of the insurance companies long ago abandoned any claim, right, title or interest that they may have had in the gold aboard the Central America. They therefore have no claim to any of the gold recovered from the Central America. Accordingly, the claims of the insurance companies and the claims of Trustees and John and Grimm are DISMISSED. Plaintiff is entitled to and is vested with the ownership to all of the gold or other artifacts recovered from the Central America.

—

APPENDIX—A

The CIGNA Group;

Commercial Union Assurance Co., Ltd.;

Commercial Union Insurance Company;

William H. McGee & Co., Inc.;

Royal Insurance;

The Royal Insurance Company, Ltd.;

The Royal Insurance Company of America;

Chubb & Son, Inc.;

Sun Alliance Group;

GRE of America Corp.;

The Guardian Royal Exchange;

Indemnity Mutual Marine Assurance Company;

Sun Insurance Company of New York;

Sun Insurance Office, Ltd.;

London Associated Corporation;

The Royal Marine;

Royal Associated Corporation;

Indemnity Mutual;

Royal Exchange & London Offices;

Indemnity Marine;

Underwriters at Lloyd's;

Union Bank of London;

Commonwealth Fire Insurance Co.;

The remaining claimants are:

Atlantic Mutual Insurance Company;

Insurance Company of North America;

The Salvage Association;

The London Assurance;

Alliance Assurance Company, Ltd.;

The Royal Exchange Assurance;

Indemnity Marine Assurance Company, Ltd.;

The Marine Insurance Co., Ltd.; and

The Superintendent of Insurance of the State of New York.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2730
CA-87-363-N

COLUMBUS-AMERICA DISCOVERY GROUP,
Plaintiff-Appellee,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; HARRY G. JOHN; JACK F. GRIMM,
Plaintiffs,

v.

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,
Claimants-Appellants,

and

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 33 minutes North Latitude; Western Boundary —77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes West Longitude, (believed to be in the S.S. Central America), *in rem,*
Defendant,

CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT-DOHERTY GEOLOGICAL INSTITUTE; S. S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

Claimants.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS; THE BOARD OF UNDERWRITERS OF NEW YORK,

Amici Curiae.

No. 90-2731
CA-89-626-N

HARRY G. JOHN; JACK F. GRIMM,
Plaintiffs-Appellants,

COLUMBUS-AMERICA DISCOVERY GROUP,
Plaintiff-Appellee,
and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
Plaintiff,

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK; CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL;

ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT-DOHERTY GEOLOGICAL INSTITUTE; S. S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,
Claimants,

v.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 33 minutes North Latitude; Western Boundary —77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes West Longitude, (believed to be in the S.S. Central America), *in rem,*
Defendant,

AMERICAN INSTITUTE OF MARINE UNDERWRITERS; THE BOARD OF UNDERWRITERS OF NEW YORK,
Amici Curiae.

No. 90-2732
CA-87-363-N

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
Plaintiff-Appellant,

COLUMBUS-AMERICA DISCOVERY GROUP,
Plaintiff-Appellee,
and

HARRY G. JOHN; JACK F. GRIMM,
Plaintiffs,

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK; CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT-DOHERTY GEOLOGICAL INSTITUTE; S. S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

Claimants,

v.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the follow-

ing coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 40 minutes North Latitude; Western Boundary —77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes west longitude, (believed to be in the S.S. Central America), *in rem*,
Defendant.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS; THE BOARD OF UNDERWRITERS OF NEW YORK,
Amici Curiae.

[Filed October 15, 1992]

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Appellee filed a petition for rehearing with suggestion for rehearing in banc and appellants filed answers to the petition. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Widener, Hall, Sprouse, Murnaghan and Wilkins voted to rehear the case in banc, and Chief Judge Ervin, Judges Russell, Phillips, Niemeyer, Hamilton, Luttig and Williams voted against rehearing in banc. Judge Wilkinson disqualified himself from participation.

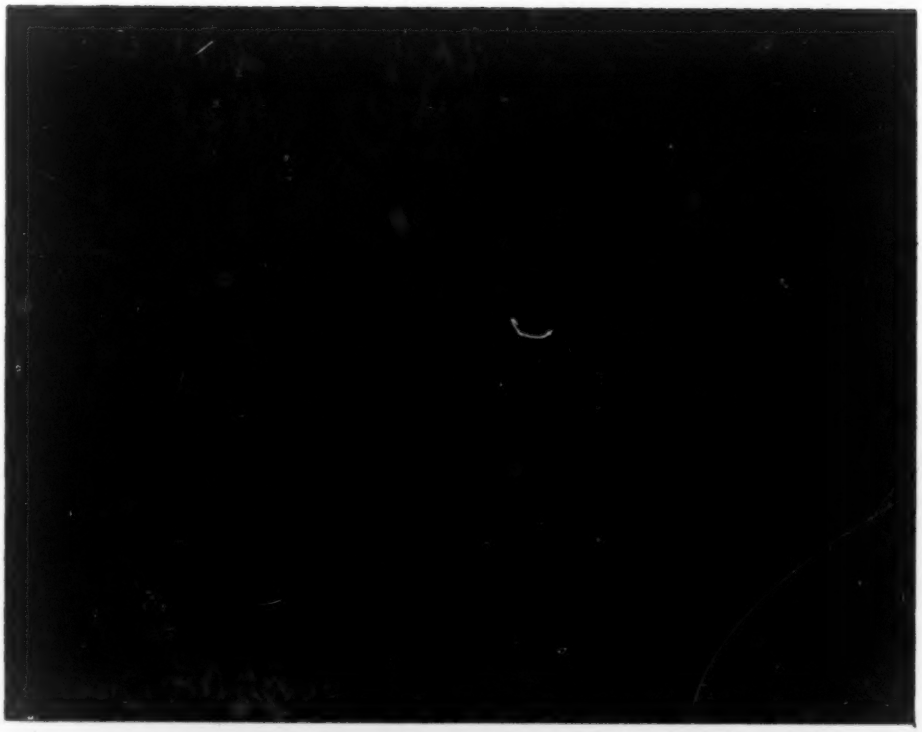
The original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

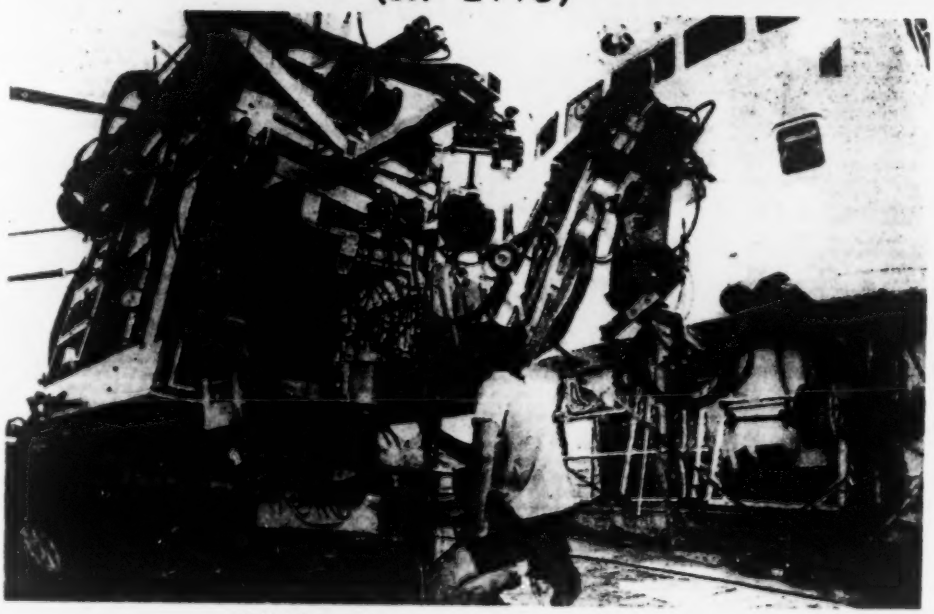
Entered at the direction of Judge Russell, with the concurrence of Judge Hall. Judge Widener dissents.

For the Court,

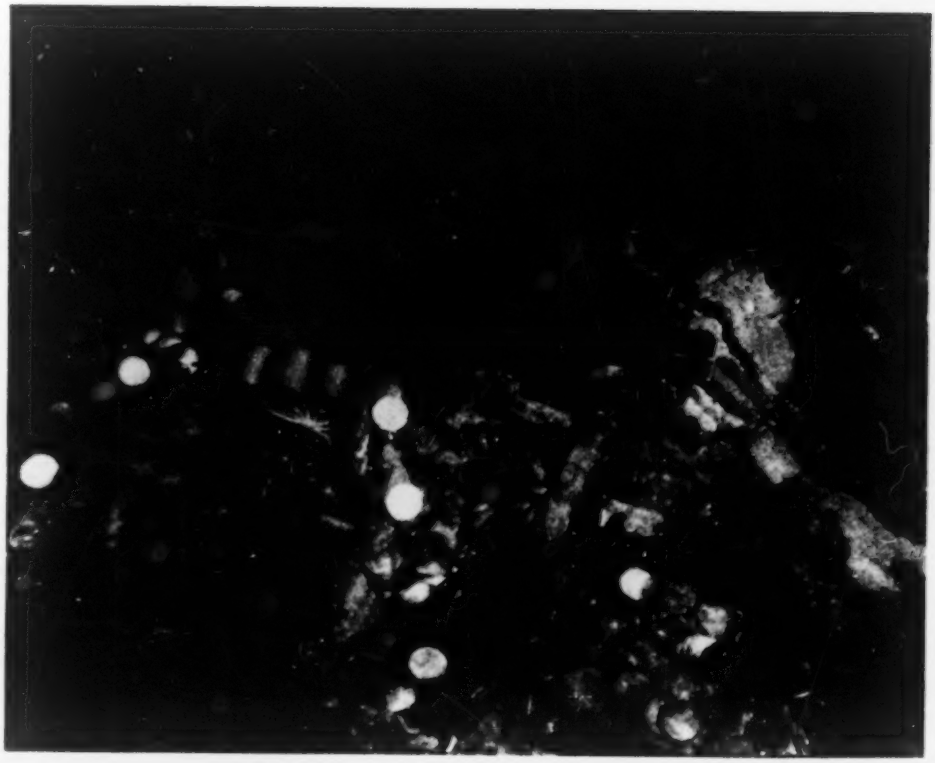
/s/ Bert M. Montague
Clerk



(R. 1773)



(4th Cir. J.A. 3108)



(4th Cir. J.A. 3059)

Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

No. 92-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

—v.—

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should courts cast aside the law of salvage and, instead, apply the law of finds even where the owner of sunken property files claim, proves ownership and shows positive intent not to abandon—and even though the law of finds previously has been applied only when an owner of a long sunken wreck no longer exists or files no claim?

2. Whether sunken property can be considered "abandoned" even though:

    a) owner files claim in admiralty proceeding;

    b) sufficient documentary evidence is provided to prove ownership;

    c) the evidence indicates predisposition by the owner not to abandon; and

    d) the property was taken by *force majeure* (hurricane) and it has been technologically impossible to recover until recently?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1189

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

—v.—

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

No jurisdictional basis exists for granting the Petition for a Writ of Certiorari. The Court of Appeals for the Fourth Circuit did not enter judgment; it simply remanded this case for further proceedings by the trial court. Furthermore, there is no conflict among the United States Courts of Appeals and this case does not involve an important question of federal law. *See* Sup. Ct. R. 10.1(a)-(c).

STATEMENT OF THE CASE

This is an Admiralty Rule C[1] *in rem* action to enforce a maritime lien for salvage with respect to the S.S. CENTRAL AMERICA which sank in a hurricane in 1857. Petitioner, Columbus-America Discovery Group [hereinafter "CADG"], gave notice of this action to some of the owners of a commercial shipment of specie which had been on board. The owners [hereinafter "Respondents"] promptly filed claims in the proceeding. The trial court bifurcated the proceedings: first, a trial on the question of ownership and abandonment and, second, a salvage award proceeding. In the first phase, Respondents introduced corporate documents, public records and other evidence proving that they had insured the commercial shipment of $1,219,189.00, that they had paid claims, and thus they became the owners. (Pet. App. 28a.) Evidence also was introduced regarding recovery efforts showing that the insurers had no intention of abandoning such a valuable cargo. (Pet. App. 32a-33a.) The district court found that Respondents had insured and paid for the loss of the treasure but that they had abandoned their interest. Title to the insured shipment was awarded to CADG under the law of finds. (Pet. App. 102a.)

The Court of Appeals for the Fourth Circuit reversed in part and remanded the matter for a salvage award proceeding. (Pet. App. 7a, 28a, 34a.) The court upheld the finding of the lower court that the insurers had paid claims and became owners of the commercial shipment. (Pet. App. 29a.) The finding of abandonment by the lower court was reversed as clearly erroneous, and the application of the law of finds was held to be improper. (Pet. App. 31a-34a.)

CADG's request for rehearing and suggestion for a rehearing *en banc* were denied. (Pet. App. 110a.) No request for a stay of the proceedings was made to the Fourth Circuit and the matter has been remanded to the lower court for a salvage award pro-

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[1] Fed. R. Civ. P. Supplemental Rules for Certain Admiralty and Maritime Claims.

ceeding. Trial has been set for June 29, 1993, and discovery is proceeding.[2]

REASONS FOR DENYING THE WRIT

CADG seeks to terminate rights of owners of sunken property by overturning established admiralty law. To succeed, CADG would re-write the law governing recovered property lost at sea by applying the law of finds in an unprecedented manner.

This matter involves rights to sunken treasure on the Outer-Continental Shelf, outside the territorial waters of the United States.[3] CADG is not satisfied with an equitable salvage award but seeks title to the entire treasure.[4] There are no special or important reasons for granting a writ of certiorari in this case. There are no conflicts whatsoever among the circuits with respect to the applicable law nor is there a state court decision involved. All of the circuit court decisions relied on by CADG involve cases **where no owner was present** and, therefore, the law of finds was properly applied therein.[5] In this case, however, **proven owners were present.**

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[2] Columbia University, Harry John and Jack Grimm have intervened in the proceedings claiming part of the salvage award based on allegations CADG used information taken from Columbia University to find the wreck. Their rights are not addressed in the petition.

[3] *See* discussion *infra* pp. 9-10. The Abandoned Shipwreck Act of 1987, 43 U.S.C. §§2101-2106 (1988), does not apply to the CENTRAL AMERICA.

[4] CADG may receive "by far the largest share" of the treasure on remand. (Pet. App. 34a, 36a.)

[5] *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) ("no person or firm appeared to assert any overall claim of ownership"); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir.) (*Treasure Salvors III*), *on remand*, 546 F. Supp. 919 (S.D. Fla. 1981) (parties stipulated that wreck of the ATOCHA was abandoned by original owners); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985) (no original owner of 240 year old wreck; dispute between salvor and state). *See* discussion *infra* pp. 5-6.

At trial, over 500 exhibits were introduced in addition to testimony of a maritime archeologist, a fiscal historian and marine insurance experts. The district court concluded that Respondents were the owners of the commercial shipment. (Pet. App. 95a.) This finding on ownership was upheld by the Fourth Circuit. (Pet. App. 28a.) By referring to Respondents as "purported owners," CADG reveals what it is actually seeking—yet another review of the factual issue of ownership. CADG seeks to make this Court a trier of fact. While granting of a writ is discretionary, a grant of a writ to review evidence or specific facts is generally not warranted. *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See Texas v. Mead*, 465 U.S. 1041 (1984).

Because this matter is on remand and there is no final judgment, this matter is not yet ripe for review by this Court. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). There are no grave matters of importance in this case which warrant the issuance of a writ prior to final judgment.

I. Admiralty Courts Are Uniform in Their Application of the Law of Salvage and the Law of Finds

CADG attempts to manufacture a conflict among the United States Courts of Appeals regarding application of the law of salvage and the law of finds, even though no conflict exists. Admiralty courts have been uniform in their application of the law of salvage and the law of finds. The Fourth Circuit's opinion is consistent with all other courts of appeals in applying the law of salvage to property in which an owner asserts a claim; those courts applied the law of finds only to unclaimed property. Where the law of salvage provides an adequate remedy for the disposition of sunken property, salvage concepts and proceedings are applied. *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 556 (S.D. Fla. 1982).

> [A]dmiralty has historically disfavored the law of finds, preferring instead the distinct policies of the law of salvage.

Hener v. United States, 525 F. Supp. 350, 355 (S.D.N.Y. 1981). The law of salvage applies in all but the most extraordinary circumstances. *Id.* (Pet. App. 16a-17a.)

When the owner comes forward and makes an appearance, all courts have uniformly applied the law of salvage. *Hener, supra*, at 358; T. Schoenbaum, *Admiralty and Maritime Law* 514 (1987); (Pet. App. 22a.) The general rule requires that the law of finds is applied only "in extreme cases where the property is wholly derelict and *affirmatively* abandoned by the owners and underwriters." *Brady v. S.S. AFRICAN QUEEN*, 179 F. Supp. 321, 324 (E.D. Va. 1960) (emphasis added). *See also Zych v. Unidentified, Wrecked and Abandoned Vessel*, 755 F. Supp. 213, 214 (N.D. Ill. 1991), *vacated and remanded on other grounds*, 960 F.2d 665 (7th Cir.), *cert. denied*, 113 S. Ct. 491 (1992). A finding of affirmative abandonment is a prerequisite to awarding title to a salvor, when an owner is present. (Pet. App. 21a.)

The law of finds, under which a salvor may gain title, is an exception to the traditional application of the law of salvage and has been applied where no owner has come forward and where no owner is likely to do so. *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 551 (Mass. 1988). *See also Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) (existence of owner was a fiction); *Treasure Salvors v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 556 F. Supp. 1319, 1334 (S.D. Fla. 1983) (vessel indisputably abandoned; owner not in existence). Generally, in such cases, the contest was between competing salvors or between the salvor and the sovereign, particularly state governments. In any event, no owner appeared. Courts have inferred abandonment in such cases, as did both lower court decisions in this case with respect to passenger gold.

The courts have awarded title to salvaged property to the salvor only in cases where no claim of ownership was asserted by the owner or where there has been an affirmative abandonment. (Pet. App. 21a.) In the cases relied upon by CADG, the owners no longer existed, and their existence was deemed "a fiction."[6] The salvor was awarded title so as to avoid the administrative inconvenience of a salvage award proceeding and sale. This line of cases has no application to a proceeding where owners appear promptly upon legal notice after the property is brought into the jurisdiction of the court and ownership is proven, as occurred in this case.

The district court decision stood alone in awarding title to a treasure hunter based on the law of finds, despite the presence of proven owners in the proceeding. (Pet. App. 22a.) The Court of Appeals properly reversed an opinion that broke with admiralty precedent. There is no conflict whatsoever as a result of the Fourth Circuit opinion. The application of the law of finds is not "foreclosed" as CADG argues. The law of finds may be applied to wrecks when the existence of the owner is a "fiction." The law of finds does apply to unclaimed passenger gold on the CENTRAL AMERICA, but not to the commercial shipment that was insured by Respondents.[7] (Pet. App. 27a, 28a.)

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[6] For example, no owner asserted any claim to the S.S. REPUBLIC. *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987). In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981) (*Treasure Salvors III*), *on remand*, 546 F. Supp. 919 (S.D. Fla. 1981), it was *stipulated* that the vessel was abandoned and no owner appeared. *See* Pet. App. 22a.

[7] The lower court's application of the law of finds and inference of abandonment as to the vessel, artifacts and passenger gold was specifically upheld by the Fourth Circuit. (Pet. App. 28a.)

II. The Fourth Circuit Properly Required Clear and Convincing Evidence of Abandonment

The Fourth Circuit correctly held that when an owner claims long-lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment and such must be proved by clear and convincing evidence. (Pet. App. 34a.)

A fundamental maxim of a free government is that the right of private property remains sacred. *Stanley v. Colt*, 72 U.S. (5 Wall.) 119 (1866). Ownership is the collection of rights to use and enjoy property. *Black's Law Dictionary* 1106 (6th ed. 1990). Abandonment is the repudiation of ownership. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 677 n.8 (1982). There must be clear and convincing evidence of abandonment in order to deprive an owner of his rights. (Pet. App. 20a.) There is a strong natural presumption that property is not abandoned and the party alleging abandonment must produce clear evidence of the owner's intent to abandon property. *Wilson v. Colorado Mining Co.*, 227 F. 721, 725 (8th Cir. 1915); *accord United States v. Robinson*, 430 F.2d 1141, 1143 (6th Cir. 1970) (party seeking to establish abandonment has an "especially heavy burden"); T. Schoenbaum, *Admiralty and Maritime Law* 512 (1987) (same). Abandonment must be voluntary and involves a positive intention to part with ownership. *Hoelzer v. City of Stamford, Conn.*, 722 F. Supp. 1106, 1111 (S.D.N.Y. 1989), *aff'd*, 933 F.2d 1131 (2d Cir. 1991). While abandonment may be inferred from the surrounding facts and circumstances when no owner appears in an *in rem* proceeding, there is no authority to do so when an owner appears in the proceeding, establishes his ownership, and there is no showing of affirmative abandonment.

CADG asks the Court to do the unthinkable—to impose a judicial statute of limitations on ownership. CADG confuses a claim against a third party, which can be forfeited by inaction, with ownership which can only be lost by voluntary relinquishment. Ownership is not a claim against a third party

which terminates if it is not exercised. It is a right lost only by clear and express renunciation.

The Court of Appeals concluded that a serious mistake had been made and reversed the district court's finding of abandonment because there was no evidence to support it. (Pet. App. 31a, 34a.) Not only was the property taken from the owners' possession by an act of God, but the technology to recover it from a depth of 8,000 feet was only recently developed. Further, all evidence points to an intent not to abandon. Respondents' actions showed a positive "pre-disposition not to abandon." (Pet. App. 32a.)

CADG's concern about overburdened courts is misplaced. It is CADG's conduct in this matter, which if successful, would lead to increased litigation.[8] Application of the law of finds to cases in which owners are still in existence will only serve to encourage treasure hunters to attempt to defeat owners' claims in court. Instead of resolving these matters commercially through contracts, salvors would be encouraged to litigate title in most cases, creating an unnecessary burden on the courts. The time-honored tradition of cooperation between salvors and underwriters would be undermined[9] and courts flooded with unnecessary litigation.

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[8] Few similar cases have been reported due in part to the normal commercial resolution of such matters by underwriters. The only comparable example involved the rights to the LADY ELGIN which sank 130 years ago. Sufficient documentation for proof of ownership was provided by owners in that case as well. *Zych, supra*, at 215. (Pet. App. 31a.) *See also United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992) (involving federal government), *petition for cert. filed*, 61 U.S.L.W. 3404 (U.S. Nov. 18, 1992) (No. 92-859).

[9] The Salvage Association in London has entered into contracts on behalf of underwriters for salvage on sunken wrecks dating back to the 1700's. The litigation herein could have been easily avoided if CADG had contracted with Respondents and resolved this matter commercially in the normal course of business.

III. Court Of Appeals Decision Promotes Historic Preservation and Uniformity in Admiralty Law

Through the rules of salvage, admiralty courts have been able to provide an equitable means of balancing the individual rights of the salvor with the rights of the owner of salvaged property. By precedents that have served the maritime industry well for centuries, the law imposes a lien on the salvaged property to protect the claim of the salvor and requires the salvor to act as a fiduciary in protecting the property for the owner. The law of finds has only been applied to resolve the problem faced when no owner can be found or the owner has affirmatively repudiated title to the property. (Pet. App. 16a-20a.)

International uniformity in admiralty and marine insurance matters is essential to maritime commerce. In England, as here, the rule is that no abandonment occurs unless there is some overt act which clearly constitutes abandonment. (J.A. 423-24, Aff. of English Law.)[10] The High Court of Australia and others have taken the same position.[11] The opinion below is in complete conformity with national and international admiralty practice.

CADG complains that the decision of the Court of Appeals upholding traditional admiralty law will somehow "confuse" public administration of historic shipwrecks under the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106 (1988) [hereinafter "ASA"]. However, ASA specifically does not apply to shipwrecks on the Outer-Continental Shelf where the

[10] "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business." *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924).

[11] In *Robinson v. Western Australian Museum*, 16 A.L.R. 623 (1977) (Austl.), the original owner retained title to the GILT DRAGON which sank in 1656. *See* pp. 647, 648, 654, 663, 671, 673-74. *See also Simon v. Taylor*, [1975] 2 Lloyd's Rep. 338 (Sing. Ct. 1974).

CENTRAL AMERICA lies. 43 U.S.C. § 2106(b). Furthermore, neither the law of finds nor the law of salvage applies to shipwrecks covered by ASA. 43 U.S.C. § 2106(a). Nevertheless, CADG argues erroneously that management of historic shipwrecks under ASA will be adversely affected.

Both the express statutory language and the legislative history of ASA indicate that in order for a shipwreck to be abandoned, it must "have been deserted" and the owner must have "relinquished ownership rights with no retention." 43 U.S.C. § 2101(b). *See also* S. Rep. No. 241, 100th Cong., 2d Sess. 5 (1987) (clarifying abandonment).[12] With respect to shipwrecks covered by ASA, Congress is assumed to use the term "abandonment" to include centuries of admiralty legal practice. *See Morissette v. United States*, 342 U.S. 246, 263 (1952); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 325 (1990). The Fourth Circuit opinion is in conformity with the Abandoned Shipwreck Act Guidelines promulgated by the Department of the Interior[13] and with the law maritime which requires clear and convincing evidence of abandonment when an owner appears.[14]

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[12] Initial versions of this legislation would have included any shipwreck over 100 years of age as historic and left the determination of abandonment to the Secretary of the Interior. *See* H.R. 132, 97th Cong., 1st Sess. (1981), introduced by Mr. Bennett on January 5, 1981. This approach was rejected in the final legislation which left the determination of abandonment to the courts.

[13] "When the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner." 55 Fed. Reg. 50,116, 50,120-21 (1990).

[14] This is not to say that abandonment may never be inferred now, as CADG argues. The Court of Appeals acknowledges that abandonment may be inferred when no owner exists or comes forward to assert a claim and, following such precedent, upheld the lower court's inference of abandonment with respect to passenger gold, artifacts, and the hull of the CENTRAL AMERICA. (Pet. App. 28a.)

Historic preservation of shipwrecks, especially those not subject to ASA, such as the CENTRAL AMERICA, is best encouraged by the approach set forth by the Fourth Circuit which specifically listed the care taken by the salvor in preserving historical material as a factor to be considered in determining the size of the salvage award. In treasure salvage cases, the extent to which the historical value of the wreck and of the artifacts are preserved for the public good is a factor to be considered in setting the salvage award. (Pet. App. 35a-36a.) Through its equitable powers, an admiralty court applying salvage law may reward such efforts. If, however, courts applied the law of finds, title would pass entirely to the treasure hunter, with no supervision whatsoever of the preservation of historical treasures *See Hener v. United States*, 525 F. Supp. 350 (S.D.N.Y. 1981); (Pet. App. 36a); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982). The interests of uniformity in admiralty law, of the maritime community, and of historic preservation of shipwrecks are well served by the reasoned opinion below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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February 16, 1993

APPENDIX

APPENDIX

List of parent companies and subsidiaries of Respondents pursuant to Sup. Ct. R. 29.1

The following Respondents do not have any parent companies or subsidiaries (not wholly owned):

Atlantic Mutual Insurance Company
Salvage Association
Superintendent of Insurance of the State of New York

The following are parent or subsidiary companies (not wholly owned) of the remaining Respondents:

Insurance Company of North America—CIGNA Corporation (parent)

The London Assurance—Sun Alliance Group plc (parent),
—Protea Assurance Company Limited (subsidiary)

Alliance Assurance Company, Ltd.—Sun Alliance Group plc (parent)

Indemnity Marine Insurance, Ltd.—Commercial Union plc (parent)

Marine Insurance Company, Ltd.—Royal Insurance Holdings plc (parent)

Royal Exchange Assurance—Guardian Royal Exchange Assurance plc (parent)

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No. 92-1189

IN THE

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OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

—v.—

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

Respondents[1] oppose the various motions for leave to file briefs *amicus curiae* in this matter. These are not friends of the Court. Most are closely linked organizations, paid consultants, sub-contractors, former employers and other parties related to Petitioner.

The filing of a brief *amicus curiae* prior to the granting of a *writ* without consent of all parties is looked upon with disfavor by the Court. Sup. Ct. R. 37.2. Nevertheless, Petitioner has

[1] Disclosure of parent and subsidiary companies of Respondents pursuant to Sup. Ct. R. 29.1 is found in the Appendix to Respondents' Brief in Opposition.

requested numerous organizations and governmental agencies to file *amicus* briefs. A copy of such communications received by one institution has been forwarded to Respondents. (*See* Appendix A.) In urging potential *amici* to disregard Rule 37, Petitioner stated:

> "Numerous filings, by many independent interests, can be crucial to obtaining certiorari. For each filing made, the Clerk makes a separate, distinct entry on the docket sheet. This entry summarizes the filing and its substance. **The more such filings, the more likely it is that the Court will perceive that the case involves a matter of substantial public interest**".

Memorandum of Richard T. Robol (Counsel of Record), November 9, 1992, at 1. (emphasis added). (*See* Appendix A.) If successful, the effort by Petitioner to flood the Court with unnecessary *amicus* briefs would set a bad precedent. Sup. Ct. R. 37.1.

We note the following with respect to the individual applications to file briefs *amicus curiae*:

(1) The Adjunct Science and Education Association was created by and is supported by the Petitioner, Columbus-America Discovery Group [hereinafter "CADG"]. The director of this project is a sponsor and an advisor to another *amicus*.[2]

(2) Battelle Memorial Institute is a sub-contractor and/or supplier of parts to CADG. It is also the former employer of at least one of the principals of CADG. (J.A. 603.)

(3) Counsel of record for two of the parties seeking *amici* status have stated that their briefs were prepared by CADG's counsel, that one had not read the Fourth Circuit opinion and that submission of the briefs came as a result of solicitation by

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[2] *See Sea History*, Winter 1992-1993, at 1, 48 (National Maritime Historical Society).

CADG.[3] One counsel has admitted that CADG paid for the printing of its brief.[4]

(4) One party has instructed counsel to withdraw its brief. (Appendix B.) Improprieties in obtaining authority to file are alleged. (*See* Appendix C.) Petitioner seeks to have another group adopt this "brief without an *amicus*." (*See* Appendix B.) An attorney who respresents CADG was instructed to withdraw the brief. *Id.*

(5) One counsel claims to represent classes of *amici*. In fact, he represents a few individuals.[5]

(6) Counsel for two of the would-be *amici* failed to contact counsel for Respondents in order to request permission to file a brief *amicus curiae* pursuant to Supreme Court Rule 37.2. Nevertheless, both briefs claim that counsel for Respondents have refused consent.[6]

The various briefs *amicus curiae* bring nothing new to this matter. This is a dispute about ownership of gold. (Pet. App. 6a.) There is no dispute about ownership of artifacts nor about the hull of the wreck. Those belong to the salvor pursuant to the law of finds because they have been abandoned as held by both lower courts. (No owner appeared to claim title.) (Pet. App. 28a.)

The owners of the gold have not abandoned their interest (Pet. App. 31a-34a) and the matter has been remanded for a

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[3] Titanic International, Inc. and Marine Technology Society. Telephone conversations dated February 8 and 12, 1993.

[4] Florida Bar Admiralty Law Committee (withdrawn; *see* Appendices B and C).

[5] Brief of Teachers and Administrators in Secondary Schools, Educational Television, Ham Radio Operators and Others Interested in Public Education, at p. 2.

[6] Explorers Club and Florida Bar Admiralty Law Committee (withdrawn).

trial on the amount of a salvage award. The degree to which historical items have been preserved is a factor to be considered in setting the award. (Pet. App. 35a-36a.) *Amici* admit that the Abandoned Shipwreck Act has no application in this case.

Respondents respectfully urge that the motions to accept the briefs *amicus curiae* be denied.

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APPENDICES

APPENDIX A

TO: FILE
FROM: RICHARD T. ROBOL
DATE: 11/9/92

MUSEUM AND PRESERVATIONINST CONCERNS IMPLICATED BY FOURTH CIRCUIT'S SS CENTRAL AMERICA RULING

ISSUES

Several historic preservation and museum groups, as well as states, state attorney generals, scientific and academic groups, are considering filing a brief *amicus curiae* in support of Columbus-America's petition for *certiorari*. Such support is of vital importance to the Group, and could well make the difference between whether the petition for *certiorari* is granted—or not.

In protecting historic preservation interests, three distinct issues arise. First, in light of Supreme Court Rule 37.2— which indicates that, where a party opposes participation of the amicus, the motion for intervention as *amicus curiae* is "disfavored"—how likely it is that the Court will allow intervention of preservationist *amici*? Second, specifically, what kinds of museum and preservationist concerns are implicated by the Fourth Circuit's majority opinion? Third, how broad is concern with the decision among the historic, preservationist and scientific communities?

DISCUSSION

1. Likelihood and Effect of the Supreme Court Granting Amicus Status to the Groups' Committed to Historic Preservation.

The U.S. Supreme Court will almost certainly grant leave to file as *amicus curiae* to any group that wants to file. Although,

on its face, Rule 37.2 discourages filing of amicus briefs absent consent of all parties, the actual practice is to allow such filings as a matter of course. Indeed, recent clerks for certain justices on the Supreme Court are aware of no instances where leave to file has been denied.

Groups filing *amicus curiae* brief enjoy the advantage of being able to influence the development of case law, without being bound by the final decision. A decision would have no res judicata or collateral estoppel effect on the amicus.

Numerous filings, by many independent interests, can be crucial to obtaining *certiorari*. For each filing made, the Clerk makes a separate, distinct entry on the docket sheet. This entry summarizes the filing and its substance. The more such filings, the more likely it is that the Court will perceive that the case involves a matter of substantial public interest.

Note

To avoid burdening the Court, only page one of a ten page memorandum is provided. The remaining nine pages of this memo contain arguments which are reflected throughout the briefs *amicus curiae*. The additional nine pages are available on request.

APPENDIX B

[LETTERHEAD OF NOVA UNIVERSITY]

TELEFAX

To: Marilyn Lytle
William R. Connor III

From: Bob Jarvis (Initialed B.J.)

Re: The Admiralty Law Committee of The Florida Bar

Date: February 24, 1993

Further to our telephone conversation this morning, I write to confirm that I sent a telefax to David Horan and Joshua Morse at 11:30 p.m. last night instructing them to withdraw the amicus brief that had been filed on behalf of the Admiralty Law Committee of The Florida Bar in the *Columbus-America* case. Shortly after our telephone conversation this morning, I spoke by telephone with Mr. Horan and he advised me that the notice of withdrawal was in the process of being filed by Professor Morse.

As I also explained to you when we spoke this morning, Mr. Horan has advised me that the notice of withdrawal will be "coupled" with a notice of adoption of the brief by the Monroe County Bar Association.

cc: David P. Horan
Joshua M. Morse III
Connie Stewart

APPENDIX C

[LETTERHEAD OF SULLIVAN & BOYD]

February 23, 1993

Robert Mark Jarvis, Chairman
Admiralty Law Committee, et al.

Re: Columbus-America Discovery Group, Inc., et al. vs.
Atlantic Mutual Insurance Company, et al.
U.S. Supreme Court Case No.: 92-1189
Amicus Curiae Brief of the Admiralty Law Committee

Dear Executive Committee:

I am an admiralty and maritime attorney practicing in Jacksonville, Florida who does not represent any of the parties in Columbus-America Discovery Group, Inc., et al. vs. Atlantic Mutual Insurance Company, et al. I have recently been advised that an *amicus curiae* brief was submitted on behalf of the Admiralty Law Committee to the Supreme Court in that case. My understanding is that the *amicus curiae* brief has been returned by the Clerk of the Court for the purpose of curing certain technical errors and that it has not been officially filed for the Supreme Court's consideration.

I am writing you to strongly urge that the *amicus curiae* brief not be re-filed in this action. It is my belief that the circumstances surrounding the drafting and preparation of the brief create the appearance of impropriety and the appearance that the Plaintiffs in the above referenced case have misused the Admiralty Law Committee to support their position in litigation which is pending before the Supreme Court.

I have spoken with most of you by telephone about this matter and have advised you of my position. However, let me take this opportunity to review the facts known to date:

1. On February 10, 1993, a letter was telefaxed from David Paul Horan of Horan, Horan & Esquinaldo to most but not all of the current members of the Admiralty Law Committee. A copy of the letter is attached hereto.

The letter is signed by David Paul Horan for Robert M. Jarvis, Chairman of the Admiralty Law Committee. The letter fails to disclose that David Paul Horan is counsel for Columbus-America Discovery Group, Inc. Mr. Horan has a $1^1/_2\%$ contingent fee interest in the outcome of the case before the U.S. Supreme Court and is not a member of the Admiralty Law Committee. I have spoken to a number of the members of the committee who feel that they were not adequately informed by the letter of the action that the committee proposed to take.

The letter states that "it is presently intended that unless there is substantial opposition from the members of the Admiralty Law Committee, the *amicus curiae* brief in support of the Supreme Court accepting review will be filed. By telefaxing back your reply to telefax number (305) 294-7822 (Horan, Horan & Esquinaldo) no later than 3:00 p.m. Friday, February 26, 1993 you may indicate your opposition to the brief in support of review."

The letter was telefaxed out to the members of the Admiralty Law Committee late in the day on February 10, 1993 and required a response in less than 48 hours. The letter was not addressed to the individual members of the Admiralty Law Committee and those firms which had numerous members received only a single ballot for the entire firm. Many of the Admiralty Law Committee members have advised me that they never received a copy of the ballot and were never aware of the fact that the Admiralty Law Committee was considering filing a brief.

2. On the morning of February 12, 1993, the Florida Bar Board of Governors was approached with a request for permission to file an *amicus curiae* brief. The time for responding to the telefaxed ballot had not yet expired.

3. Thereafter, Professor Joshua Morse, Professor of Law at Florida State University College of Law was contacted by The Florida Bar and was told that the Board of Governors of the Florida Bar had authorized him to file an *amicus curiae* brief on behalf of the Admiralty Law Committee. Joshua Morse, a respected Professor of admiralty law at Florida State University, is not a member of The Florida Bar nor the

Committee. He has in the past served as co-counsel with David Paul Horan in cases representing treasure salvors and in particular was co-counsel in the case of Treasure Salvors, Inc. vs. The State of Florida, a case arising out of the discovery of the Spanish sailing vessel ATOCHA.

The brief was drafted by both David Paul Horan and Professor Morse and was typed by Mr. Horan's office. It was then sent to a printer. The printer sent a letter to Professor Morse, requesting that he give them permissions to attach his name for the brief was paid for by Columbus-America Discovery Group, Inc.

4. On February 22, 1993 I spoke with Professor Morse concerning the course of events which led up to the filing of the *amicus curiae* brief. Professor Morse has advised me that if he receives adequate evidence showing that the *amicus curiae* brief was filed without the authorization of the Admiralty Law Committee, he will voluntarily withdraw that brief from the U.S. Supreme Court. On February 23, 1993 we had a subsequent conversation wherein he advised me that he believed that a Chairman of the Committee could authorize the filing of an *amicus curiae* brief without the approval of the Committee.

Based upon the foregoing, I believe the conclusion is unescapable that the Admiralty Law Committee is being utilized by Columbus-America Discovery Group, Inc. to advance their position before the United States Supreme Court. It further appears that the members of the Admiralty Law Committee have not been adequately advised about the contents of the brief to be submitted to the Supreme Court, have not been offered an opportunity to reflect on whether or not the Admiralty Law Committee should take a position on this issue, and that consequently this action should not be taken by the Committee. Under these circumstances, I believe that the only honorable action to be taken by the Executive Board of the Admiralty Law Committee is to withdraw the brief of Professor Joshua Morse from the United States Supreme Court.

I appreciate your assistance in giving this matter your close attention. Should any of you wish to contact me directly, I would be glad to speak to you.

Very truly yours,

/s/ G. J. SULLIVAN, JR.
G.J. Rod Sullivan, Jr.

GJS/cpw
Enc.

[Letterhead of HORAN, HORAN & ESQUINALDO]

February 10, 1993

TO: FLORIDA BAR ADMIRALTY LAW

FROM: DAVID PAUL HORAN

CLIENT/FILE NAME: Admiralty Law Committee—
ROBERT M. JARVIS,
Chairman

TELECOPY TRANSMITTED TO: Current Members of the
Committee

Dear Admiralty Law Committee Member:

On behalf of Chairman Bob Jarvis, this fax is a quest that you indicate any opposition to the filing, by the Admiralty Law Committee, of an *Amicus Curiae* Brief in support of the United States Supreme Court accepting review of a Fourth Circuit Opinion in Columbus America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel (E.D. Va. 1990, 4th Cir. 1992). The Fourth Circuit Opinion narrowly (2-1) overturned a District Court decision awarding the salvor title to all salvage recoveries from an admittedly abandoned vessel. The vessel is the U.S.S. Central America which sank September 12th, 1857. The Fourth Circuit Opinion, while acknowledging that the vessel was abandoned by its owners, concluded that none of the cargo on an abandoned shipwreck was ever "abandoned" within the meaning of federal admiralty law, absent "an owner's express declaration abandoning title". The Court of Appeals split 7 to 5 in denying rehearing and rehearing en banc. The question presented will be a "burden of proof" issue. The question to be presented for certiorari review is whether there is a rebuttable presumption of abandonment as to all salvage from an admittedly abandoned shipwreck.

As usual, "Time is of the Essence" and it is presently intended that unless there is substantial opposition from the members of the Admiralty Law Committee, The *Amicus Curiae* Brief in support of the Supreme Court accepting review will be

filed. By faxing back your reply to Fax No. (305) 294-7822 no late than 3:00 P.M., Friday, February 12th, you may indicate your opposition to the Brief in Support of Review.

Please call David Paul Horan (305) 294-4585 with any questions with regard to this matter.

/s/ DAVID PAUL HORAN,
for ROBERT M. JARVIS

I OBJECT TO THE ADMIRALTY LAW COMMITTEE FILING THE ABOVE BRIEF

_____
COMMITTEE MEMBER NAME

_____
DATE/TIME

Supreme Court, U.S.
FILED
FEB 23 1993
OFFICE OF THE CLERK

No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,
v.
ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR THE PETITIONER

When the Fourth Circuit panel handed down its decision, respondents hailed it as a maritime law landmark. *See Salvors Must Give Up Treasure*, USA Today, Aug. 28, 1992 at 6A. Now that Columbus-America seeks relief from the Court, respondents suddenly see the case as insignificant and factbound. Respondents' first impression was correct. The opinion below breaks with other circuits to create an admiralty law conflict of national significance. Respondents have offered no reason in their Opposition why the Court cannot or should not grant certiorari to resolve the important issue presented.

1. Respondents' half-hearted suggestion that the Court lacks jurisdiction because the court of appeals remanded for further proceedings is simply wrong. "As long as the jurisdiction of the court of appeals has properly been invoked and a timely petition for certiorari is filed, the

Supreme Court has jurisdiction to take the case whatever its status in the lower court." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 41 (6th ed. 1986) (citing *The Conqueror*, 166 U.S. 110, 113-14 (1897)). The court of appeals reversed the district court on a cleanly presented admiralty law issue that is directly raised here. The Court routinely grants certiorari to review important legal issues following court of appeals decisions ordering further proceedings on remand. *See, e.g., Denton v. Hernandez*, 112 S. Ct. 1728, 1732 (1992); *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1315-16 (1992); *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 687 (1992).

No further proceedings on remand can alter the court of appeals' imposition of a *per se* rule against finding abandonment in any case where a purported owner appears. The insurance companies' assertion that Columbus-America's petition "seeks to make this Court a trier of fact" on the issue of ownership (Br. in Opp. 4), is a disingenuous attempt to confuse matters.[1] Columbus-America does not seek review of any holding with respect to ownership. On the contrary, the issue here is the court of appeals' reversal of the district court's determination that respondents *abandoned* any interest they "may have had" in the gold aboard the CENTRAL AMERICA. Pet.

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[1] Respondents similarly attempt to diminish the significance of the court of appeals' decision by saying Columbus-America may receive "by far the largest share" of the treasure on remand. Br. in Opp. 3 n.4. According to respondents, seeking this Court's review of the important maritime issue presented merely indicates Columbus-America's greedy desire to get even more of the treasure. In the district court, in contrast, respondents are vigorously arguing that the greatest award to which Columbus-America could possibly be entitled under the law of salvage, on any facts, is fifty percent. *See* Claimants-Underwriters' Brief in Opposition to the Plaintiff's Motion for an Interim Order 4 (filed Dec. 2, 1992); *see also Treasure Hunters May Not be Able to Keep Bounty, Court Rules*, Wall Street Journal, Aug. 28, 1992 at B6 (statement by respondents' counsel of record that normally a salvage award "doesn't exceed 50%").

App. 102a. Respondents' own statements elsewhere in its brief acknowledge the nature of the single *legal* issue presented. Br. in Opp. 3 ("To succeed, CADG would re-write the law governing recovered property lost at sea by applying the law of finds.")

Respondents' brief studiously avoids Columbus-America's point—that the court of appeals *should* have allowed the case to be decided on examination of all the facts and circumstances indicating abandonment in accordance with established law. Instead, the court of appeals announced an ironclad rule that no abandonment can be found, and that salvage law must apply, any time a purported owner appears.[2] Under the court of appeals' rule, only an "express declaration abandoning title" can suffice to prove abandonment where a party claiming ownership appears. Pet. App. 27a. Respondents repeatedly refer to this rule as though it were hornbook law, yet in support they offer either a citation to the opinion below, or no citation at all. *See* Br. in Opp. 5, 6, 7.[3] It is the court of appeals' legal rule governing abandonment—not a factual determination —that is at issue here.

---

[2] Respondents' objection to Columbus-America's use of the term "purported owner" is curious since the panel majority itself stated that salvage law must be applied whenever parties "who *intend to assert* a claim of ownership" appear. Pet. App. 21a (emphasis added).

[3] Respondents have attempted to bolster the court of appeals' strict rule against finding abandonment with irrelevant citations to criminal search and seizure cases, *United States v. Robinson*, 430 F.2d 1141, 1143 (6th Cir. 1970), and cases involving government property, *Hoelzer v. City of Stamford*, 722 F. Supp. 1106 (S.D.N.Y. 1989), *aff'd*, 933 F.2d 1131 (2d Cir. 1991). This may not be coincidental, for as petitioner has pointed out, the rule adopted by the Fourth Circuit is essentially the requirement of express abandonment that courts have traditionally applied only to *government* property such as warships. *See* Pet. 12 (discussing *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3452 (U.S. Nov. 18, 1992) (No. 92-859)); Lohrey, *Sunken Vessels, Their Cargoes, and the Casual Salvor*, JAG Journal 25, 27, 29 (July-Aug. 1965).

2. Respondents simply repeat the panel majority's assertion that there is no conflict among the courts of appeals because in other cases applying finds law no owner has appeared. *See* Br. in Opp. 4. Yet respondents offer no explanation for the fact that nothing in those decisions indicates that the failure of an owner to appear was dispositive. *See* Pet. 16. Respondents similarly offer no response to Columbus-America's observation that the Fourth Circuit and the other courts of appeals to address the law applicable to long-lost shipwrecks will plainly reach different results on the same facts. *See* Pet. 16-17. Respondents are unable to explain away circuit court cases where application of the law of finds was critical in resolving ownership battles between discoverers and the government. *See Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) ("The common law of finds is the appropriate law to examine to determine the ownership of the shipwreck."); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (law of finds is "correctly applied" to long-lost shipwrecks). Finally, respondents say nothing whatever about the state supreme court cases squarely stating that abandonment may be found as against an *owner*. *See* Pet. 16 (discussing *Wyman v. Hurlburt*, 12 Ohio 81 (1843), and *Eads v. Brazleton*, 22 Ark. 499 (1861)).[4]

Respondents' formalistic contention that courts are not in conflict over the application of finds or salvage law to long-lost shipwrecks is at odds with what has been said by the courts themselves. The First Circuit, for example, observed that the "better-reasoned authorities" agree that finds law should be utilized. *Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987). Leading commentators—in the course of endorsing the appli-

[4] *See also Howard v. Sharlin*, 61 So.2d 181 (Fla. 1952); *Steinbraker v. Crouse*, 182 A. 448 (Md. 1936).

cation of finds law to long-lost wrecks—have also noted the conflict in the cases. *See* 3A M. Norris, *Benedict on Admiralty* § 158 (7th ed. 1993); T. Schoenbaum, *Admiralty and Maritime Law* § 15-7 (1987); Edelman, *Who Gets Treasure Recovered From Sea?*, N.Y.L.J., Dec. 4, 1992 at 3, 4 (conflict will "need resolution by the Supreme Court"); Giesecke, *To Be or Not to Be Abandoned*, Sea Technology, Jan. 1993 at 93 (decision below "departs from established legal precedent defining abandoned shipwrecks" on the basis of "passage of time and the failure to retain records or make attempts at recovery").

The interest in the international uniformity of admiralty law cited by respondents only highlights the need for the Court's attention. Respondents assert that English law imposes the same rule of express abandonment adopted by the court of appeals below. Br. in Opp. 9. But as pointed out by *amicus*, The Explorers Club, the controlling British precedent actually holds that a wreck's contents may be *presumed abandoned* from the passage of time. *Pierce v. Bemis*, [1986] 2 W.L.R. 501 (Q.B. 1985). The British presumption of abandonment is the same rule stated by the First Circuit in *Martha's Vineyard*, 833 F.2d at 1064-65. It is the rule rejected by the opinion below. The uniformity of admiralty law, both national and international, as well as prevention of the widespread forum shopping that admiralty jurisdiction would otherwise allow, requires that certiorari be granted.

3. The importance of the legal issue raised here has been amply demonstrated in the many filings submitted to the Court. The development of new recovery methods has vastly multiplied the practical significance of this area of the law. *See generally Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. Times, Feb. 2, 1993, at B1, B6 ("If upheld, experts say, the [court of appeals'] decision might spur clandestine recovery or reduce the overall levels of shipwreck hunting and photography.") The opinion below will not only chill private exploration efforts

but also adversely affect the interests of States and the federal government charged with administering historic shipwrecks under the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106. *See* Pet. 23. Respondents' contorted reading of the Act cannot avoid the fact that the court of appeals' dramatic change in the general maritime law definition of "abandoned," which the Act incorporates, will revive stale interests in (and generate endless litigation over) numerous historic wrecks previously considered abandoned and therefore subject to state and federal supervision.

Respondents contend that historic preservation and exploration are best served by the court of appeals' opinion. Br. in Opp. 9. But the participation here of the States and the numerous private organizations promoting exploration and historic preservation belies their claim. In respondents' view, the first task of undersea explorers should be to research the existence of corporate entities or their successors who (despite the passage of decades during which they made no effort at recovery) might assert a claim. Instead of treating a long-lost wreck as an integrated whole, respondents' approach would fracture historic shipwrecks into a multiplicity of property interests, each of which might be controlled by a different insurance carrier or descendant.

Contrary to respondents' statement that litigation could be "easily avoided" through commercial arrangements (Br. in Opp. 8 n.9), explorers would be required to negotiate with a multitude of purported owners. Before research and exploration could proceed, the parties undertaking the risk (and the investors on whom the explorers must rely) would have to agree to hand over a substantial percentage of any eventual recovery. The pernicious effects of such an approach on maritime exploration are obvious. Respondents' defense of the court of appeals' rule boils down to this: better that discoveries not be made at all than that indolent insurance companies' stale claims go unsatisfied.

The conflict created by the opinion below threatens both the uniformity of the law of admiralty and the viability of emerging deep sea exploration and recovery initiatives. The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. TRAFFORD
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MOTION FILED
FEB 16 1993

No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF BATTELLE MEMORIAL INSTITUTE IN SUPPORT OF PETITIONER

PAUL T. SANTILLI
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Counsel for Amicus

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1189

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF BATTELLE MEMORIAL INSTITUTE IN SUPPORT OF PETITIONER

Battelle Memorial Institute ("Battelle") hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

Battelle is an organization dedicated to combining scientific, technical, and management expertise to assist both the private sector and governmental entities in developing, commercializing, and managing technology. Battelle has developed extensive ocean engineering capabilities and has assisted the United States Navy with ship salvage, deep-ocean recovery, and undersea work systems.

Battelle is dedicated to applying and enhancing the technology needed to explore and research previously in-

accessible areas and to developing new technology that promises to greatly increase the extent of those endeavors. Progress in developing this technology will be affected by the results of this case.

Although the importance of expanding our horizons in deep ocean exploration is widely accepted, the fact remains that such endeavors rely almost exclusively on sophisticated and costly specialized technologies. See U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation—Background Paper*, OTA-BP-E-37, 8 (1987). Because exploration of outlying areas is costly, it cannot be accomplished without the participation and support of the private sector.

Financial incentives are needed for the private sector to finance the continued development of technologies required for recovery in deep-ocean environments. Battelle believes that progress in these areas of exploration and research will be significantly impaired if the Fourth Circuit's opinion in this case is allowed to stand.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

PAUL T. SANTILLI
(*Counsel of Record*)
BATTELLE MEMORIAL INSTITUTE
505 King Avenue
Columbus, Ohio 43201-2693
(614) 424-6424
Counsel for Amicus

February, 1993

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1189

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF BATTELLE MEMORIAL INSTITUTE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

Battelle Memorial Institute ("Battelle") is an organization dedicated to combining scientific, technical and management expertise to assist both the private sector and governmental entities in developing, commercializing and managing technology. Battelle has developed extensive ocean engineering capabilities and has assisted the United States Navy with ship salvage, deep ocean recovery and undersea work systems. Battelle believes that progress made in these areas of exploration and research will be impaired if the Fourth Circuit's opinion in this case is allowed to stand.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE FOURTH CIRCUIT'S REFUSAL TO INFER ABANDONMENT OF LONG-LOST SHIPWRECKS WARRANTS REVIEW BY THIS COURT

Dramatic improvements in technology have now opened the deep seas to exploration, research, and responsible enjoyment. Groups such as Battelle are deeply committed to not only applying and enhancing existing technology to enable such exploration and research, but also developing new technology. Progress in developing this technology will be distinctly affected by the results of this case.

II. THE FEDERAL GOVERNMENT'S NATIONAL POLICY ENCOURAGES THE DEVELOPMENT AND ENHANCEMENT OF TECHNOLOGIES FOR THE EXPLORATION OF THE DEEP OCEAN

Our national policy of encouraging the development of technology to assist in deep ocean exploration can be traced back to the Marine Resources and Engineering Development Act of 1966, 33 U.S.C. § 1101 *et seq.* (1988), "to develop, encourage, and maintain a coordinated, comprehensive, and *long-range* national program in marine science [1] for the benefit of mankind." 33 U.S.C. § 1101(a) (emphasis added). One of the primary purposes of this legislation is to promote "[t]he development and improvement of the capabilities, performance, use, and efficiency of vehicles, equipment, and instruments for use in . . . the marine environment." 33 U.S.C. § 1101(b)(6). To accomplish this laudatory objective, the President is responsible for ensuring that the federal government, in conjunction with states and private institutions and industry, develops a program comprised of a wide array of marine science activities, including exploration of the marine environment and marine engineering in general. 33 U.S.C. § 1103(a)(2).

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[1] The term "marine science" is specifically defined to include "engineering and technology in and with relation to the marine environment." 33 U.S.C. § 1107.

In recognition of the national significance of our vast marine environment, Congress supplemented the Marine Resources and Engineering Development Act with the passage of the Marine Sanctuaries Act in 1972. 16 U.S.C. § 1431 *et seq.* (1988) (amended 1992). The Marine Sanctuaries Act is designed to protect ocean resources by, among other things, "support[ing], promot[ing], and coordinat[ing] scientific research" of the marine environment. 16 U.S.C. § 1431(b)(3), (5).

III. THE TECHNOLOGIES REQUIRED FOR EXPLORING AND CONDUCTING RESEARCH IN REMOTE ENVIRONMENTS ARE EXPENSIVE

Although the importance of expanding our horizons through breakthroughs in deep-ocean exploration is widely accepted, the fact remains that such endeavors rely almost exclusively on sophisticated and costly specialized technologies. *See* U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation—Background Paper*, OTA-BP-E-37, 8 (1987). In fact, meaningful exploration of the ocean floor is virtually impossible without advanced equipment such as side-scan sonar, sub-bottom profilers, magnetometers and remotely operated vehicles. *See generally* Horrell, Note: *Telepossession is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery*, 3 Pace Y.B. Int'l L. 309 (1991).

A. Because of the Cost of the Sophisticated Technologies Needed to Explore and Research Remote Areas, the Federal Government has Recognized the Critical Need to Involve the Private Sector in These Endeavors

In light of the fact that exploration of outlying areas is costly, it simply cannot be accomplished without the participation and support of the private sector. Because of Congress' acute awareness of this fact, one of the primary objectives of the Marine Resources and Engi-

neering Development Act of 1966 is to encourage "private investment enterprise in exploration, technological development, marine commerce, and economic utilization of the resources of the marine environment." 33 U.S.C. § 1101(b)(3). The Act accordingly envisions a "continuing partnership" among governmental agencies and "private industry, universities, organizations, and individuals concerned with or affected by ocean . . . resources." 33 U.S.C. § 1121(a)(5).

IV. THE FOURTH CIRCUIT'S DECISION SEVERELY IMPAIRS THE CONTINUED PRIVATE DEVELOPMENT OF MARINE TECHNOLOGIES BY REMOVING THE FINANCIAL INCENTIVES NEEDED FOR SUCH DEVELOPMENT

The Fourth Circuit's novel holding that title to long-lost property does not vest in those who labor to discover and preserve it unless they prove by "clear and convincing evidence" that a purported owner abandoned its interest in the property by express disclaimer, virtually guarantees that the law of salvage will be applied whenever long-lost property is recovered. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 464 (4th Cir. 1992). This is due largely to the fact that because of the passage of time and other factors, there is rarely, if ever, any evidence that the owner of long-lost property affirmatively renounced all rights to that property. *Id.* at 472 (Judge Widener dissenting). The decision of the Court of Appeals makes it difficult to attract the private funding and enterprising explorers required to explore and conduct research in methods of deep-ocean recovery. In the past, the incentives provided by the predictability that title to recovered long-lost items would vest in the discoverers under the prevailing law of finds were sufficient to attract private funding. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987); *Cobb Coin Co. v. Unidentified,*

Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540 (S.D. Fla. 1982); *Eads v. Brazleton*, 22 Ark. 499 (1861).

Without the financial incentives needed to finance the continued development and enhancement of the sophisticated technologies required for deep-ocean recovery, this source of funds will be adversely affected.

CONCLUSION

To encourage private funding and enterprising explorers to explore and conduct research in the methods and equipment for recovery in deep-ocean environments requires predictability that title to recovered long-lost items will vest in the recoverers. The Fourth Circuit's decision makes the determination of title unpredictable, thus discouraging private investment, which is contrary to the public policy of supporting research in the marine environment.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE COLUMBUS MUSEUM OF ART IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE COLUMBUS MUSEUM OF ART IN SUPPORT OF PETITIONER

The Columbus Museum of Art hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

Founded in 1878, the Columbus Museum of Art is the oldest art museum in Ohio, housing over 6,000 objects from the Western artistic tradition. The world premier of deep-ocean photography as a new form of art took

place at the Columbus Museum of Art in the summer of 1992, during the exhibit *Shipwreck!*. Exhibited alongside the deep-ocean photography were artifacts and treasures retrieved from the *S.S. Central America*. *Shipwreck!* included a "time capsule room" that displayed a number of artifacts recovered from the shipwreck that helped give visitors a picture of life in 1857. The room included clothing, jewelry, dishes, bottles, an 1857 newspaper, cigars, luggage tags and much more.

The undersea photographic images, historical documentation and incredibly well-conserved artifacts that Columbus-America Discovery Group provided to the Columbus Museum of Art during the summer of 1992 provided a rare and wonderful opportunity to educate thousands of vistors about the evolving synthesis of art and science. Museum professionals understand, perhaps better than others, how truly rare this opportunity was. The museum was presented with a group of experienced collectors, conservators and curators, together with an intact collection, carefully conserved by a single entity—Columbus-America Discovery Group.

New developments in underwater photography and cinematography involving the use of deep-diving robots with advanced cameras and lights have produced vivid images of the beauty of the ocean floor, thus enabling marvelous exhibits such as *Shipwreck!*. While photographs of shipwreck sites are often taken to aid explorers, the photographs themselves often emerge as the real treasure. *William J. Broad, Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. Times, Feb. 2, 1993, at B3, B6.

It is estimated that more than 1,000,000 ships have been lost to the seas during recorded history. George F. Fichter, *The Future Sea* 55 (1978). There are literally thousands of long-lost shipwrecks serving as time capsules of ancient civilizations. "It is probable that a greater number of monuments of the skill and industry

of man will in the course of ages be collected together in the bed of oceans, than will exist at any one time on the surface of the Continents." *The Sea Remembers* (Peter Throckmorton ed., 1987) at 226. Therefore, the proper exploration, discovery, and recovery of shipwreck sites must be encouraged and cultivated.

If the decision below is allowed to stand, it may well herald the end of the type of multidisciplinary efforts in which Columbus-America Discovery Group has been an innovator, with artists and scientists creating and working side-by-side to safeguard the vast historical and artistic material lying on the ocean floor.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE COLUMBUS MUSEUM OF ART IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Columbus Museum of Art is the oldest art museum in Ohio, housing over 6,000 objects from the Western artistic tradition. In addition to maintaining and expanding its diverse collection, the museum offers films, a regular speaker series, summer jazz concerts, an active volunteer program, and a photography council. Millions of Americans, from all states, have enjoyed the aesthetic and entertainment offerings of the Columbus Museum of Art since the museum's founding in 1878.

Because museums are the most active buyers in the international art market, they seek to acquire high quality works that capture the public's interest. The world premier of deep-ocean photography as a new form of art took place at the Columbus Museum of Art in the summer of 1992. Exhibited alongside the deep-ocean photography were artifacts and treasures retrieved from the *S.S. Central America*. The exhibition of the photographs and artifacts from the *S.S. Central America* has proven to be among the Columbus Museum of Art's most fascinating, widely-viewed, and memorable collections, but the Fourth Circuit Court of Appeals' decision presents a novel legal impediment to the continuation of such exhibits. Because the Columbus Museum of Art seeks to foster the continued inspiration of artists in every imaginable medium, and is profoundly troubled by the Court of Appeals' shift of burdens of proof to the finders, creators and doers in our nation, it respectfully asks the Court to review the decision below.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE DECISION BELOW HARMS OCEAN PHOTOGRAPHY, CINEMATOGRAPHY, OPPORTUNITIES FOR ARTISTIC EXPRESSION AND THE WIDESPREAD ENJOYMENT OF THE DEEP SEA

A. New Advances in Technology Have Increased Opportunities for Self-Expression in the Fine Arts in the Deep Sea and Provided Vast Material of Creative Value

As we move toward the twenty-first century, the traditional definitions of art and science are beginning to change. The days when paintings, drawings, etchings and sculpture were considered the only "art" are long past. Photography and cinematography, which began as mechanical methods for simply mirroring reality, have become rich art forms. Henry Talbot, an early pioneer

in the field of photography, saw photography as a form of art which merged the worlds of art and science and provided "a multitude of minute details which add to the truth and reality of the representation, but which no artist would take the trouble to faithfully copy from nature." Thomas B. Allen, *Capturing the Image, in* Inventors and Discoverers: Changing Our World 154 (National Geographical ed., 1988). Cinematography has also experienced an evolution from a purely media form to a powerful art form. "Born as a way to preserve reality, photography evolved into an art that, in the movies, produced illusions." *Id.* at 151.

In the twentieth century, photography and cinematography have become foremost mediums in our visually-oriented culture. At the same time, these mediums have developed as a unique means of artistic expression and a vital art form. Today, photography and cinematography are often recognized as the artistic mediums that best address the nature of our time.

New developments in underwater photography and cinematography involving the use of deep-diving robots with advanced cameras and lights, have produced vivid images of the beauty of the ocean floor. The technology to photograph the ocean floor has been used by explorers to document the discovery of shipwreck sites. This technology has already been used to photograph the images of the *Titanic*, the Nazi battleship *Bismarck*, the 1812 warship *Hamilton*, a fourth-century Roman merchant vessel, an American dirigible from the 1930's lost to the seas, a German U-boat, a sunken Douglas Dauntless bomber, 14 wrecks from the battle of Guadalcanal in World War II and the *S.S. Central America*. William J. Broad, *Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. Times, Feb. 2, 1993, at B3, B6. While photographs of shipwreck sites are often taken to aid explorers, the photographs themselves often emerge as the real treasure. *Id.* at B6. A Toronto effort recently cre-

ated a three-dimensional feature-length movie utilizing new technologies for undersea photography that opened in Canada to rave reviews. *Id.* Similarly, the Columbus Museum of Art successfully exhibited its collection of photographs and film from the shipwreck of the *S.S. Central America.*

Continuing progress in the new development of underwater photographic gear promises to bring us even more dramatic pictures from the deep sea. *Id.* Along with their intrinsic beauty, as revealed by the art of underwater photography, shipwrecks also provide us with a unique opportunity to take advantage of photography and cinematography to look back into the lives of those who lived before us. The study of historic shipwrecks gives historians a valuable insight into trade, shipboard life, and the interaction between the Old and New Worlds in the exploration and settlement of this country. U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation-Background Paper*, OTA-BP-E-37, 8 (1987).

As cultural resources, shipwrecks provide valuable information about the historic changes in vessels, warfare and commerce. *The Sea Remembers* 226 (Peter Throckmorton ed., 1987). We learn about history and culture from shipwrecks through their cargoes, such as the utensils and other artifacts of daily life that the passengers carried and that sank with them, including plates, glassware, cutlery and clothing. *Id.* "From the Bronze Age to the Titanic, deepwater archaeology will throw a powerful searchlight onto the past, using sophisticated salvage techniques." *Id.* at 222. As such, shipwrecks can be understood "as potential museums." *Id.* at 226.

It is estimated that more than 1,000,000 ships have been lost to the seas during recorded history. George F. Fitcher, *The Future Sea 55* (1978). There are literally thousands of long-lost shipwrecks serving as time capsules of ancient civilizations. "It is probable that a

greater number of monuments of the skill and industry of man will in the course of ages be collected together in the bed of oceans, than will exist at any one time on the surface of the Continents." *The Sea Remembers*, *supra*, at 226. Therefore, the proper exploration, discovery, and recovery of shipwreck sites must be encouraged and cultivated. However, if the decision below is allowed to stand, it may well herald the end of the type of multidisciplinary efforts in which Columbus-America Discovery Group has been an innovator, with artists and scientists creating and working side-by-side to safeguard the vast historical and artistic material lying on the ocean floor.

B. Long-Lost Shipwreck Sites Provide a Unique Opportunity to Advance Art, History, and Education

Columbus-America Discovery Group provided the Columbus Museum of Art with the unique opportuntiy to display an intact collection of material from the shipwreck of the *S.S. Central America*. In the summer of 1992, the Columbus-America Discovery Group provided the museum with an exhibit that combined art, science, history, and exploration into a truly powerful experience that awakened the artistic and scientific spirit in everyone.

Shipwreck!, the museum's exhibit, contained 194 remarkable artifacts and images, including contemporary woodcuts, steamship and passenger artifacts, and other discoveries associated with the recovery of the *S.S. Central America*. *Shipwreck!* offered visitors the rare opportunity to view computers, laser disc players, and television monitors that allowed each person "to take part" in the discovery and exploration of the *S.S. Central America*. The addition of 3-D cinematography and photographs allowed the visitors to experience the shipwreck site as it existed more than a mile and a half below the surface.

The travelers aboard the *S.S. Central America* during her final voyage represented a multi-cultural cross-section

of 19th-century life in our nation. A "time capsule room" at the exhibit displayed a number or artifacts recovered from the shipwreck that helped give visitors a picture of life in 1857. The room included clothing, jewelry, dishes, bottles, an 1857 newspaper, cigars, luggage tags and much more. In the time capsule room, a single small case displayed several handfuls of gold dust and nuggets, representative of the gold that inspired thousands of Americans to risk their lives and fortunes to explore the new frontier. The result: dramatic westward expansion of our nation.

The Columbus Museum offered an equally rare opportunity as part of the *Shipwreck!* exhibition by presenting public lectures by academicians who were part of the discovery of the *S.S. Central America.* The exhibit of the material from *S.S. Central America* more than tripled the attendance for the museum's best previous summer exhibit and it was held over for an additional two weeks in September 1992, allowing hundreds of students to experience the beauty and excitement of the shipwreck.

II. THE PRACTICAL EFFECT OF THE DECISION BELOW WILL BE THE DIVISION OF HISTORIC SHIPWRECKS INTO A MULTIPLICITY OF OWNERSHIP CLAIMS, THEREBY DISRUPTING AND DISINTEGRATING THE HISTORIC, CULTURAL AND ARTISTIC VALUE OF SHIPWRECK SITES

In applying the law of finds, the admiralty courts have established the threshold requirement that the finder act in good faith to protect the scientific, historic and archaeological values of the shipwreck. In stark contrast, the courts have no power to impose such a requirement on an alleged owner. The alleged owner, acting either directly or through contract salvage, may do whatever it desires with its property, without regard to the destruction of the scientific and historic values of shipwrecks. Indeed, insurers typically handle salvage on a "no cure, no pay" basis; salvors are compensated solely for salvaging the

insurers' alleged property—not for protecting others' interests. *See, e.g., Florida Dep't of State v. Treasure Salvors, Inc.*, 558 U.S. 670, 713 n.11 (1982). *See also Clarke v. The Steamship Elfrida*, 172 U.S. 186, 192 (1898) (recognizing an early form of the "no cure, no pay" contract); *Sea Lift, Inc. v. Refinadora Costarricens de Petroleo, S.A.*, 792 F.2d 989, 992 (11th Cir. 1986) (noting that "no cure, no pay" is "the most widely used salvage contract in the world"); *Alva Steamship Co. v. City of New York*, 616 F.2d 605, 610 (2nd Cir. 1980) (stressing that "no cure, no pay" "is standard in the salvage trade"). As a practical matter, the majority opinion makes it impossible to prove abandonment of, and to quiet title to, ocean resources, and therefore subjects these historic sites to the often destructive law of salvage. The opinion will allow claims of ownership scores of years old to cloud title to property found at sea and subject historic shipwrecks to a multitude of fractional claims.

A. The Decision Below Disrupts the Essential Integrity of the Artistic, Historic and Educational Attributes of Shipwreck Sites

The undersea photographic images, historical documentation and incredibly well-conserved artifacts Columbus-America Discovery Group provided to the Columbus Museum of Art during the summer of 1992 provided a rare and wonderful opportunity to educate thousands of visitors about the evolving synthesis of art and science. Museum professionals understand, perhaps better than others, how truly rare this opportunity was. The museum was presented with a group of experienced collectors, conservators and curators, together with an intact collection, carefully conserved by a single entity—Columbus-America Discovery Group.

More often, when trying to display a large and representative collection of the work of an artist or a period, museum professionals face difficult barriers. Often, a

body of work has become dissipated, spread out among hundreds of owners. The *Shipwreck!* exhibition, with its clear focus on images, imaging and imagining, was only possible because the shipwreck had been so carefully recovered, conserved and maintained by a single entity. The rarity and wonder of the *Shipwreck!* exhibition became even clearer in August, 1992, when the Fourth Circuit Court of Appeals ruled that another integral part of the shipwreck, the treasure, was to be divided among numerous insurance companies (which had done nothing whatsoever to find or locate it and had contributed not a penny to assist the effort). The decision below jeopardizes the possibility of any future museum exhibitions based on the unique historical and artistic value of recovered shipwrecks, and actively encourages the filing of numerous other stale claims in the future by descendents of passengers, crew members and others. If the Fourth Circuit's opinion is allowed to stand, it will place shipwreck collections out of the reach of all but the largest and most heavily endowed museums and rob the public of the opportunity to experience the beauty and excitement of a *Shipwreck!*.

B. The Decision Encourages Secretive Behavior By the Creators, Finders and Doers in Our Nation

The effect of the Fourth Circuit's opinion is obvious. It fosters secretive behavior. Those who work long and hard, and risk millions in venture capital to locate and recover long-lost shipwrecks are rewarded for their effort with a bevy of claims by those seeking a judicial windfall.

The finders and creators and doers who create value (artistic, historic, monetary, or otherwise) will face a Hobbesian choice: if they make the fruits of their labor public, they may face literally dozens of stale claims and the burden of defending costly and protracted litigation; if they conceal their behavior, the public will lose the enjoyment of their work, but they will at least be able to

keep the fruits of their effort. The law should not foster secretive conduct, but rather should promote the full enjoyment of the artistic, historic, and scientific value of each long-lost shipwreck.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE EXPLORERS CLUB AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE EXPLORERS CLUB IN SUPPORT OF THE PETITION

The Explorers Club hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Respondents has refused consent.

The Explorers Club is an international professional society of explorers and field scientists committed to the ideal that it is vital to preserve the instinct to explore. The Club comprises several thousand men and women who are leading explorers and field

scientists in a wide variety of disciplines, many of them well known throughout the world. Noted members have included Sir Edmund Hillary, Roy Chapman Andrews, Thor Heyerdahl, Lowell Thomas, Robert Peary, and Richard Leakey, among others.

The Explorers Club seeks to advance its ideal by encouraging scientific exploration and discovery in a wide range of disciplines, by maintaining a repository of rare and unusual scientific data and materials, and by conducting research and educational activities in the public interest. The Club also acts as an endorsing or sponsoring institution for a limited number of expeditions. Through these activities, the Club aims to serve as a stimulus to the enduring spirit of exploration in human nature. The ruling below deals a heavy blow to those efforts in the context of scientific exploration on the deep ocean floor.

The Explorers Club constantly experiences the many difficulties that attend the vital human pursuit of scientific exploration and discovery, which include financial and regulatory roadblocks as well as physical dangers and natural obstacles. The issue of when artifacts and other items are considered to be "abandoned," rather than "owned" in the abstract by paper claimants, is an important legal issue worldwide. It is particularly critical in providing the necessary incentives for the emerging technology of deep-sea exploration and research. The decision in this case may well determine whether items lodged on the ocean floor can be made readily accessible to those who are willing and able to surmount the innumerable obstacles to locating and recovering them. It inevitably will have a profound effect on marine archaeology and underwater scientific exploration.

The Explorers Club thus brings a unique perspective to this case. Its historical experience includes participation in many of the most significant missions of scientific exploration undertaken in this century. The practical effects of the ruling below on those who would undertake such missions are substantial and the

attached brief seeks to illustrate them. The Explorers Club's international vantage point also allows the consideration of additional points discussed in the attached brief that may not be presented by the principal parties.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the Petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1189

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE EXPLORERS CLUB AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Explorers Club is a multidisciplinary, professional society dedicated to the advancement of field research, scientific exploration, and resource conservation of land, sea, air, and space with emphasis in the physical and natural sciences, and the ideal that it is vital to preserve the instinct to explore. As the "World Center for Exploration," the Club serves as a common bond and meeting point for explorers and field scientists worldwide. Founded at the turn of the century, the Club is now an international organization of several thousand men and women, many of them world-famous in their own right. Past Presidents and Honorary Presidents of the Club have included Admiral

Robert E. Peary, who discovered the North Pole; Roy Chapman Andrews, who led expeditions to the Gobi Desert that discovered the first fossilized dinosaur eggs; and Sir Edmund Hillary, who after repeated efforts became the first known person to scale Mount Everest in 1953.

The Club was originally established "to encourage explorers in their work by evincing interest and sympathy, and especially by bringing them in personal contact and binding them in the bonds of good fellowship." The Club pursues this aim by encouraging scientific exploration and discovery in a wide range of disciplines; by maintaining an important body of books, charts, and maps as well as an archive of other unique reference materials such as log books, diaries, correspondence, photographs, and artifacts from the collections of many famous explorers; and by conducting research and educational activities in the public interest. Thus, the Club acts as a reservoir of the instinct to explore and as a stimulus to the enduring "spirit of exploration" in human nature.

The Club also acts as an endorsing or sponsoring institution for a limited number of expeditions each year. The Explorers Club Flag represents an impressive history of courage and accomplishment, and it is considered a signal honor and privilege to carry the Flag on an expedition. The Flag has flown at both poles, at the highest mountain peaks, and in the most remote jungles and deserts; it has traveled to the depths of the ocean and to outer space. The Explorers Medal is bestowed as the Club's highest honor upon those judged to have made extraordinary contributions in the field of exploration, scientific research, or the welfare of humanity. A few of those who have carried the Flag or received the Medal are Admiral Richard E. Byrd for his Arctic and Antarctic flights and expeditions; Charles Lindbergh on his transatlantic solo flight; Thor Heyerdahl in his several recreations of primitive voyages; Richard E. Leakey for his African excavations; Dr. Robert Ballard for the discovery of the TITANIC; and numerous astronauts on their missions into space.

The Explorers Club is intimately aware of the myriad difficulties that are often encountered in the vital human pursuit of scientific exploration and discovery. These take many forms, including financial and regulatory roadblocks as well as physical dangers and natural obstacles. The issue of when artifacts and other items are considered to be "abandoned," rather than "owned" in the abstract by paper claimants, is an important legal issue worldwide. It may well determine whether those items are readily accessible to those with the ingenuity and persistence to overcome the dangers and difficulties of locating and recovering them. And in many cases, that initial determination will preordain the result of efforts to assemble the many pieces that are needed to put in motion a successful scientific expedition.

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

REASONS FOR GRANTING THE WRIT

In concluding that shipwrecks and their contents cannot be abandoned even after the passage of centuries, a divided panel of the Fourth Circuit has decided an important and increasingly recurrent question of federal admiralty law in conflict with the decisions of federal, state, and international courts. The unfortunate result of that ruling, if it is allowed to stand, will also be to impede exploration efforts significantly.

I. THE ISSUE RAISED HERE HAS INTERNATIONAL RAMIFICATIONS FOR ENCOURAGING SCIENTIFIC INQUIRY AND EXPLORATION

A. The Rights Of Discoverers And Explorers Are Of Broad And Enduring Importance, Especially When Exploring Uncharted Mysteries Like Those Of The Ocean Depths.

The importance of exploration to the advancement of human civilization is immeasurable. Since the beginning of human history, exploration, discovery, and the freedom and incentive to inquire into the unknown have enriched the lives of all humanity. Daniel Boorstin, *Discoverers and Inventors*, in *Inventors and Discoverers: Changing Our World* 6, 7 (1988). Along with discovery comes invention, as new needs must be supplied to meet unanticipated situations where individuals are matching wits with the physical and natural barriers that resist their most intrepid efforts. The role of the law in protecting discoverers and their finds "against unknown savages and unfriendly rivals" was recognized by the Framers of the Constitution, who "prophetically glimpsed the partnership" that would be formed between discovery and invention. *Id.* at 8.

In the Constitution itself, this recognition is most explicit in Article I, Section 8, which grants to Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* But it also manifests itself in many areas of American statutory and common law, which have secured to "a single community of questing mankind" the opportunity to benefit everyone by pursuing their own natural curiosity. Boorstin, *supra*, at 10.

This widespread appreciation for the fruits of broad inquiry is best explained against the backdrop of American history. Exploration has been crucial to scientific advancement, American

expansion, and economic entrepreneurship. The American continent itself was literally discovered by daring voyagers like Christopher Columbus, Cabeza de Vaca, and Hernando de Soto, who were lured to risk their lives in pursuit of discovery and financial gain.[1] In the century following the American founding, the flora, fauna, and geography of the continent were revealed by entrepreneurial individuals like Meriwether Lewis, William Clark, Zebulon Pike, and John Charles Fremont. During that time, explorers "had a profound impact upon American and western culture -- upon science, philosophy, and art, and also upon the popular imagination." William H. Goetzmann, *New Lands, New Men* 15 (1986).

Explorations throughout American history often had both scientific and economic goals. President Jefferson instructed Lewis and Clark to note trading opportunities and mineral deposits during their western journeys, and they did so even as they also documented the geography and climate of the new regions and described 120 animals and 175 plants that were previously unknown. Richard A. Van Orman, *The Explorers* 171 (1984). Many expeditions were not sponsored directly by the Government, but had to forge ahead on the vision and daring of their leaders and the capital they could manage to scrape together from a few willing backers who might harbor some hope of economic gain.

After 1890, when the United States Census Bureau declared the frontier to be officially closed, the enduring spirit of exploration was channeled into other directions. Some selflessly braved the arctic regions, such as Admiral Robert E. Peary (a former President of the Explorers Club), who was the first to reach the North Pole. Others eventually made their way into

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[1] The persistence of Columbus, whose attempts to gain financial backing at the courts of European monarchs were repeatedly rebuffed, is familiar to many American schoolchildren.

outer space, such as Scott Carpenter, who became the second American to orbit the Earth.[2]

Still others turned to explore the mysteries of the ocean depths. Interestingly enough, oceanography, "sometimes called the science of 'inner space,' much resembles astronautics, or the science of outer space." Lloyd Mallon, *Secrets of the Sea* 37 (1965). Since World War II, in particular, dramatic technological developments have opened a new age of exploration in the oceans. Increasingly sophisticated devices such as remotely operated vehicles now descend to depths of more than 20,000 feet. Equipped with cameras, mechanical arms, and sonar systems, these vehicles can provide a comprehensive view of the ocean depths for controllers on the surface, a technique known as "telepresence." *See* William J. Broad, *Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. Times, Feb. 2, 1993, at B5.

The pattern of exploration and discovery advancing science and human progress has continued in this emerging field. The recovery of long-lost artifacts from underwater shipwrecks has become a somewhat more realistic endeavor in the last decade. Estimates are that more than a million ships have been lost to the seas during recorded history, with their potential contents currently valued at more than $300 billion. George Fichter, *The Future Sea* 55 (1978). At the same time, telecommunications have allowed millions to participate in discovery, as has occurred with Dr. Robert Ballard's discovery and exploration of the TITANIC and also of long-lost Mediterranean shipwrecks. Robert P. Ballard, *The Lost Wreck of the Isis* 12-13 (1990).[3]

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[2] Carpenter, who is an Honorary Director of the Explorers Club, went on from his 1962 space mission to engage in aquatic exploration. In 1965, Carpenter spent thirty days on the floor of the Pacific Ocean as part of the Sealab II crew, which probed the potential limitations of human existence below the surface of the seas.

[3] Dr. Ballard is also an Honorary Director of the Explorers Club.

Yet, the exploration of sunken shipwrecks, a multidisciplinary activity that brings together an array of natural and social sciences, remains extremely delicate and complex. *See generally* William Wertenbaker, *Mysteries of the Deep* 295-96 (1980).

Congress has explicitly recognized that these kinds of explorations are worthy of national acclaim and encouragement. It has declared a national policy "to develop, encourage, and maintain a coordinated, comprehensive, and long-range national program in marine science for the benefit of mankind." 33 U.S.C. § 1101(a). The objectives of that policy include "encouragement of private investment enterprise in exploration, technological development, . . . and economic utilization of the resources of the marine environment," the "expansion of human knowledge of the marine environment," and cooperation "with other nations . . . in marine science activities." *Id.* § (b)(2), (3) and (8). As noted above, American law more generally reflects many of the same kinds of policies.

B. The Ruling Below Will Deter And Hamper Scientific Inquiry By Multiplying The Already Grave Difficulties In Organizing And Promoting Missions Of Exploration.

Missions of scientific exploration often are extremely difficult to initiate and organize. Indeed, except for their eventual success, the discoveries made by Petitioner from the shipwreck of the S.S. CENTRAL AMERICA follow the classic, age-old pattern of many exploration missions, and especially of modern scientific missions. Great amounts of human and investment capital were needed even to locate this particular shipwreck, and at least one mistaken identification occurred, with a consequent diversion of energies. Many people were involved in the project, and additional technologies had to be adapted to allow any realistic prospect of success. Once the site was located, prolonged operations were needed both to secure items from the wrecked vessel and to preserve them in a form allowing subsequent

scientific analysis and explanation. All told, the work done on this project took thirteen years, and the original dream was only achieved after countless harrowing brushes with possible ruin. *See generally* Timothy Noonan, *The Greatest Treasure Ever Found*, Life, Mar. 1992; *Sunken Treasure!*, Reader's Digest, Dec. 1990.

One of the major incentives for the project was provided by a doctrine of federal admiralty law, which applies the "law of finds" to long-lost shipwrecks, awarding title in the abandoned contents to anyone who manages to retrieve them. *See, e.g., Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960). Yet the ruling below refused to apply the law of finds to this shipwreck, which occurred more than 130 years ago in the depths of international waters. That ruling thus knocks out the underpinnings of the single major impetus for would-be discoverers and their potential backers to undertake the massive costs and risks of these underseas recovery missions. There is no question that the ruling below, if allowed to stand, will greatly discourage further efforts to explore the ocean depths. For those who do explore and discover submerged vessels, secrecy and outright looting will be encouraged by the hostility of this precedent to the character of the legal rights that may be conferred by such activity.

By restricting a discoverer to no recovery other than an uncertain salvage award set after the fact in a court proceeding, the ruling below undercuts the national commitment to exploration and technological development of the ocean floor that Congress had ostensibly established. The "Progress of Science" thus envisioned in the Constitution is inevitably slowed. The traditional admiralty doctrine that historically has rewarded and encouraged the active and the deserving is abruptly cast aside. Instead, that ruling bizarrely favors the putative successors of indolent claimants who went to their deaths many years before

without ever undertaking to recover what now is judged to be once again theirs! Thus would the creative spirit be fettered unjustly by an unwarranted application of peculiar and even harmful legal abstractions.

II. THE RULING BELOW IS INCORRECT AND WILL AGGRAVATE PROBLEMS OF FORUM-SHOPPING IN AMERICAN COURTS AND WORLDWIDE

A. The Ruling Below Conflicts With Many Decisions And Misapplies The Legal Rules Governing Lost Shipwrecks.

The ruling below conflicts with most of the decisions in this area. As a leading authority on admiralty law states the issue: "In virtually all of the treasure salvage cases involving wrecks of great antiquity, the law of finds, not salvage, is appropriate because 'disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.'" Thomas Schoenbaum, *Admiralty and Maritime Law* § 15-7 (1987) (quoting *Treasure Salvors*, 569 F.2d at 337).

In addition to the cases cited previously, the ruling below stands in conflict with *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985), with *Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987), and with *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985). Among the rare older cases, it also conflicts directly with *Wyman v. Hurlburt*, 12 Ohio St. 81 (1843). The existence of conflicting decisions on this issue is particularly problematic since the issue is one of admiralty law, where uniformity is necessary to discourage the extensive forum-shopping that is otherwise

permitted by the liberal venue provisions of 28 U.S.C. § 1333. *See* Schoenbaum, *Admiralty and Maritime Law* § 20-10.[4]

The court below suggested that conflicting cases can be reconciled by considering whether claimants had stepped forward to assert ownership rights in the items recovered from a wrecked vessel. Pet. 21a-27a. The suggestion is incorrect. Not only are the cases unreconciled, but the court simply ignores the clear *rationale* that is put forward in numerous decisions for applying the law of finds to shipwrecked vessels -- that a prolonged lapse of time, spanning decades or even centuries, renders ordinary notions of "ownership" obsolete. This rationale is grounded not only in plain common sense, but also in the practical reality that a lapse of time spanning generations makes any attempt to prove alleged claims of "ownership" an obvious farce. At the common law, indeed, the accepted notion of "ownership," which includes possession, control, and use, allows even a clearly lawful title in fixed land to become forfeit when these indicia are not present for a defined period, as under the doctrine of adverse possession.

In addition, the ruling below misunderstands the kinds of incentives that are conferred by the law of finds as opposed to the law of commercial salvage. When boats and other watercraft are

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[4] The decision below is also at odds with the Abandoned Shipwreck Act of 1987, which was enacted by the Congress to balance the interests of the Federal Government and the States in submerged vessels located in the territorial waters off the coasts. 43 U.S.C. §§ 2101-2106. The operation of the Act turns on the definition of the term "abandoned," which appears to prefer application of the law of finds rather than the law of commercial salvage. Although the term is not defined in the Act itself, the Committee report states that "abandonment or relinquishment of ownership rights may be implied or otherwise inferred," and "does not require the original owner to actively disclaim title or ownership." H.R. Rep. No. 100-514(I), 100th Cong., 2d Sess. 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 366. The ruling below is in square conflict with these statements.

capsized or sunk, the law of commercial salvage generally is applied to enforce some reward for those able to aid in recovering the dispossessed cargo. The site of the mishap is almost always fixed, and the owners of the property, whose posssession and control of it have been disturbed only temporarily, are typically aware of and involved in salvage efforts. In such circumstances, there is little danger of clandestine activity or looting, and the law of commercial salvage encourages useful contributions by those who otherwise lack any incentive to help. *See, e.g.*, Schoenbaum, *Admiralty and Maritime Law* § 15-7. But these circumstances are quite distinct from the case of an ancient lost shipwreck, where any salvage efforts on behalf of the original property owners have long since been abandoned. Here even the whereabouts of the wreckage often are not known with any precision, and generations may have passed since the erstwhile owners of the property had asserted any remaining interest in it. In this very different situation, the more restrictive law of commercial salvage would undercut the strong incentives needed to stimulate any new salvage efforts. Moreover, application of the law of commercial salvage would encourage secretive activity and disorganized looting by limiting any legal recovery to considerably less than might be garnered simply by quietly taking possession and control of any sunken treasure that may be found. *Id.* The ruling below thus disserves the interests of scientific exploration, historic preservation, and legal order.

B. The Ruling Below Creates Conflicts Not Only Among American Courts, But Also Among Courts Worldwide.

The conflict in decisions among the lower courts is especially important "because of the generous venue of admiralty and the worldwide character of the shipping and offshore industries." Schoenbaum, *Admiralty and Maritime Law* § 20-11. The nature of maritime law is such that an inordinate number of cases are brought in American courts, with its liberal procedures and pleading requirements, which leads to a vigorous application of the *forum non conveniens* doctrine to protect defending parties.

See, e.g., Paulsen & Burrick, *Forum Non Conveniens in Admiralty*, 13 J. Mar. L. & Com. 343 (1982). Thus, a confusion in decisions among the lower courts, which will lead directly to massive forum shopping within this country, will have a similar effect worldwide.

Even more important, the ruling below creates a conflict in decisions that extends beyond the American courts. The controlling British decision on this issue holds that the contents of a shipwreck can be presumed from the facts of the case to be abandoned after a sufficient lapse of time. *Pierce v. Bemis*, [1986] 2 W.L.R. 501 (Q.B. 1985). The case involved the wreck of the LUSITANIA. The ship had been torpedoed and sunk in 1915, which proved to be one of the major provocations that brought the United States into the First World War. In 1982, it was located and salvaged in international waters. Suit was brought to determine who had ownership rights in the vessel's contents. The English Admiralty Court held that the contents belonged to those who had salvaged them. On this point, the Court held: "So far as the owners of the contents are concerned, it is a necessary inference from the agreed facts and from the lapse of 67 years before any attempt was made to salve the contents that the owners of the contents abandoned their property." *Id.* In addition, the Court concluded that the Crown did not possess any sovereign rights over shipwrecked vessels that were located in international waters.

The ruling below stands in flat opposition to this decision of the British courts. Here, too, the S.S. CENTRAL AMERICA was identified and salvaged in international waters. The court below held as a matter of law that the contents could not be judged to be abandoned, even after more than a century had passed with no attempt made by the owners to salve them. That ruling is absurd, and its pernicious effects extend well beyond our national borders, driven by the broad and fluid reach of the federal admiralty jurisdiction. A conflict in decisions between the United States and Great Britain is particularly unfortunate, as

these two nations are leaders in maritime commerce and both aggressively enforce their admiralty jurisdiction over activities on the high seas. This Court should accept review to correct the problems caused by this anomalous ruling.

III. THE RULING BELOW CREATES THESE NEW AND RECURRING PROBLEMS AT A TIME WHEN ADVANCES IN TECHNOLOGY ARE OPENING IMPORTANT AND EXCITING NEW MYSTERIES TO THE POSSIBILITIES OF HUMAN INQUIRY

A. This Issue Is Recurring With Increased Frequency Because Of Recent Significant Technological Advances.

The legal issues raised by the identification and potential recovery of "abandoned" shipwrecks have been cropping up with much greater frequency over the past decade than ever before. These recent developments reflect dramatic breakthroughs that have occurred in underwater technologies. As the English Admiralty Court noted in its consideration of the abandoned wreck of the LUSITANIA: "In the last century the question was unlikely to arise when a ship sank in deep water because diving techniques had not been developed which enabled anyone to recover the ship or her contents." *Pierce v. Bemis,* 2 W.L.R. 501. For example, the development of remotely operated vehicles that can see and retrieve items from the deep ocean has been a phenomenon of the last quarter-century.

A comprehensive search of electronic legal databases shows that only a handful of cases involving shipwrecked vessels were decided before 1950. *See* Appendix (listing cases). None of those cases, moreover, involved the delicate and extraordinarily complex deep-sea recovery techniques that were applied in this case, which raise novel and difficult issues. Since 1950, the trickle of reported decisions stemming from disputes about shipwrecked vessels has become a steady stream. Dozens of such

cases have been reported in the last decade, *see id.*, and this is the third such case to come before this Court in the past year. *See also Zych v. The Unidentified, Wrecked and Abandoned Vessel*, 960 F.2d 665 (7th Cir.), *cert. denied*, 113 S. Ct. 491 (1992); *United States v. Steinmetz* 973 F.2d 212 (3rd Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3452 (U.S. Nov. 18, 1992) (No. 92-859).

These cases are recurring with increased frequency because of the new technologies that have made the deep sea floor accessible to scientific exploration for the first time. This advance in underwater recovery technology has been encouraged -- indeed, has only been made possible -- by the favorable climate of legal doctrine, with courts generally applying the law of finds to long-lost shipwrecks rather than the more restrictive law of commercial salvage. *See* Part IB, *supra*. The incentives thus conferred upon human activity and creativity have borne fruit in an explosion of new methods and devices whose invention and application have been spurred by the promise fostered by this favorable legal regime. Yet the ruling below, which stands in opposition to these marked trends, would substantially jeopardize the fruits of that new promise.

B. This Court Is Sensitive To The Importance Of Preventing American Law From Lagging Behind Improved Technologies.

This Court has shown a keen awareness of the need to keep American law current with the swift pace of modern technology. In countless cases, this Court has considered or revisited legal issues when their application has been affected by technological changes in society. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (applying First Amendment in the context of radio broadcasting); *Katz v. United States*, 389 U.S. 347 (1967) (applying Fourth Amendment to electronic eavesdropping devices).

The Court's vigilance has been especially acute in areas where its decisions map out most of the governing law for this Nation. This is true most notably in constitutional law, though the same principles apply also to other areas of federal law, such as the federal admiralty law.

In recent years, the Court has taken review in legions of cases raising questions spurred by the pervasive impact of modern technology. As certainly the most prominent example, the Court has grappled at regular intervals with the implications of Justice O'Connor's observation in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 454-58 (1983) (O'Connor, J., concurring), that advances in medical technology have blurred the foundations of the trimester framework advanced in *Roe v. Wade*, 410 U.S. 113 (1973). To list just a few other examples from the past several Terms, the Court has considered whether the Sixth Amendment allows closed-circuit transmission of witness testimony to the defendant, *Maryland v. Craig*, 497 U.S. 836 (1990); how modern medical support mechanisms prolonging life may affect the right to privacy, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); whether helicopter observations of private property violate the Fourth Amendment, *Florida v. Riley*, 488 U.S. 445 (1989); and whether hypnotically refreshed testimony can be excluded under the Fifth and Sixth Amendments, *Rock v. Arkansas*, 483 U.S. 44 (1987).

C. This Court's Sensitivity To Changing Technologies Is Especially Critical In The Realm Of Admiralty Law.

This Court's evaluation of the impact of technology on legal doctrine is especially appropriate within the realm of admiralty law, where the Court has "large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959); U.S. Const., art. III, § 3 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction"). This Court has been charged since the Founding of our Nation with primary authority

to develop a federal common law of admiralty, subject to occasional intervention by Congress. Thus the Court itself sets many of the incentives for human progress in the fields of endeavor touched by admiralty law.

The Court has recognized the significance of these concerns in granting review of previous admiralty cases. For example, in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), the Court granted review of a case involving an airplane crash. The Court took the case to clarify an increasingly important legal issue that had created conflict among the lower courts: whether the circumstances of modern aviation required a reformulation of the traditional locality test for determining admiralty jurisdiction over maritime torts. *Id.* at 252-61. In that case, the Court reaffirmed application of the traditional jurisdictional rules.

In like manner, the Court granted review of another such issue in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). The question raised was whether the collision of two pleasure boats, neither of which was engaged at all in maritime commerce, brought the ensuing dispute within the federal admiralty jurisdiction. Justice Powell noted that the issue raised was novel, for "[p]leasure boating is basically a new phenomenon, the product of a [new] technology." *Id.* at 680-81 (Powell, J., dissenting) (quotation omitted). The Court judged this new issue to be important enough to resolve the confusion that it found among the lower courts, *id.* at 669, and ultimately held that its historic doctrines must be modified to address this new situation.

Indeed, the Court's proper role in the realm of admiralty law is analogous to the central role played by the state courts of last

resort in interpreting and adapting the common law.[5] There the common-law courts have been quite cognizant of the need to reconsider legal doctrines as their practical application is altered or even transformed by the rapid march of science. Examples of this intensive focus in the common law abound in property law, *see, e.g.*, *Smith v. New England Aircraft Co.*, 170 N.E. 385 (Mass. 1930) (property rights of landowners modified to allow aerial navigation); *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907) (describing special law of capture developed for migratory subterranean natural resources, such as oil and gas); in tort law, *see, e.g.*, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (announcing unprecedented ground of tort liability for automobile manufacturers to injured customers); Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) (contending that an invasion of privacy tort is justified based on legal responses to new technological intrusions into private life); and in contract law, *see, e.g.*, *Trevor v. Wood*, 36 N.Y. 307 (1867) (adapting mailbox rule for contract offers where transmission is by telegraph). Abundant examples exist also in the judicial rules that have been devised to modernize procedural law. *See, e.g.*, Fed. R. Civ. P. 30(b)(4) and (7) (allowing depositions to be videotaped or taken by telephone); *id.* 5(e) (allowing papers to be filed with the court by facsimile transmission); Fed. R. Evid. 1003 (allowing duplicate copies to be admitted to the same extent as originals under the "best evidence" rule).

These are but a few of the many instances in which advancing technologies have created important new legal questions that demanded a review of existing practices. The issue raised here

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[5] "The federal judiciary both constitutionally and traditionally plays a much greater role in the development of maritime law than in the development of non-maritime common law. State law plays a diminished and secondary role." Schoenbaum, *Admiralty and Maritime Law* § 15-7.

is of the same character and is taking on an expanding significance. Certiorari should be granted.

CONCLUSION

For these reasons, as well as those stated in the Petition, the Court should grant the Petition for a Writ of Certiorari.

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February 16, 1993

APPENDIX

JUDICIAL DECISIONS INVOLVING SHIPWRECKS, IDENTIFIED IN FEDERAL AND STATE ELECTRONIC DATABASES (WESTLAW AND LEXIS)

Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450 (4th Cir. 1992), *rev'g* 742 F. Supp. 1327 (E.D. Va. 1990)

Deep Sea Research, Inc. v. The Brother Jonathan, 1992 Dist. LEXIS 4575 (N.D. Cal. Mar. 4, 1992)

United States v. Steinmetz, 973 F.2d 212 (3rd Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3452 (U.S. Nov. 18, 1992), *aff'g* 763 F. Supp. 1293 (D.N.J. 1992)

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Sub-Sal, Inc. v. The DeBraak, 1992 WL 39050 (D. Del. Feb. 4, 1992)

Zych v. Unidentified, Wrecked and Abandoned Vessel, 941 F.2d 525 (7th Cir. 1991), *aff'g in part* 746 F. Supp. 1334 (N.D. Ill. 1990)

Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, 895 F.2d 116 (3rd Cir. 1990), *rev'g* 710 F. Supp. 1020 (D.N.J. 1989)

Marx v. Guam, 866 F.2d 294 (9th Cir. 1989)

Fitzgerald v. Unidentified, Wrecked and Abandoned Vessel, 866 F.2d 16 (1st Cir. 1989)

Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Vessel, 691 F. Supp. 1377 (S.D. Fla. 1988)

Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E. 2d 549 (Mass. 1988)

Riebe v. Unidentified, Wrecked and Abandoned 18th Century Shipwreck, 691 F. Supp. 923 (E.D.N.C. 1987)

Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059 (1st Cir. 1987)

Indian River Recovery Co. v. The China, 645 F. Supp. 141 (D. Del 1986)

Indian River Recovery Co. v. Faithful Stewart, 1986 WL 7513 (D. Del. June 11, 1986)

Pierce v. Bemis, [1986] 2 W.L.R. 501 (Q.B. 1985)

Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985), *aff'g* 568 F. Supp. 1562 (S.D. Fla. 1983)

Chance v. Certain Artifacts Found and Salvaged, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985)

Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 717 F.2d 6 (1st Cir. 1983)

Subaqueous Exploration & Archaeology Ltd. v. Unidentified, Wrecked and Abandoned Vessel, 577 F. Supp. 597 (D. Md. 1983), *aff'd mem.*, 765 F.2d 139 (4th Cir. 1985)

Platoro Ltd. v. Unidentified Remains of a Vessel, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983), *vacating in part* 518 F. Supp. 816 (W.D. Tex. 1981)

Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 556 F. Supp. 1319 (S.D. Fla. 1983)

Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982), *rev'g in part* 621 F.2d 1340 (5th Cir. 1980), *on remand*, 689 F.2d 1254 (5th Cir. 1982)

Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540 (S.D. Fla. 1982)

Metropolitan Dade County v. One (1) Bronze Cannon, 537 F. Supp. 923 (S.D. Fla. 1982)

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FEB 16 1993

No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE FLORIDA BAR ADMIRALTY LAW COMMITTEE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE FLORIDA BAR ADMIRALTY LAW COMMITTEE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Florida Bar Admiralty Law Committee moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The Florida Bar is an organization of attorneys licensed to practice within the State of Florida and includes members of the judiciary, academicians and others who are interested in the development and application of the

law. The Admiralty Law Committee (Committee) is a subsection of the Florida Bar. The Committee's members represent all interests in the field of admiralty and maritime jurisprudence. The Committee is especially attuned to developments in the law of finds, wrecks and commercial salvage, and the substantial and ever-increasing litigation over these matters that is occurring in the state and federal courts within Florida and other jurisdictions.

Due to the importance of the issues raised by this case for admiralty and maritime law, the Board of Governors of the Florida Bar has authorized the Admiralty Law Committee to file this Brief in support of granting the Petition for Writ of Certiorari. The Committee strongly believes that this case is an appropriate vehicle for resolution of a nationally important maritime issue that must be determined in the developing industry of high-technology maritime recovery.

Moreover, the Florida Bar recognizes that its members have responsibilities that extend beyond their ethical duties to represent clients as zealous advocates (and their concomitant duties to their clients of competence, confidentiality and professionalism). The members of the Florida Bar also recognize that, with their privilege of practicing the profession of law, also comes the responsibility to the public to assist in improving the legal system.

The Fourth Circuit's holding that the determination of whether property has been abandoned in effect requires an express disclaimer of title—and is anything other than a question for the admiralty court to decide, based on all of the relevant facts and circumstances, underscores an untenable conflict among the circuits and state courts on a very basic issue of admiralty law. By limiting the concept of abandonment of claims to the hull, tackle, apparel, engines and cargo to cases of express renunciation of title, the decision below forecloses any supplementation of the law of salvage by the law of finds. In doing so, the majority opinion conflicts with the opinions of the courts of appeals, district courts, and state su-

preme courts. Thus, the majority opinion below impinges on the uniformity of admiralty law and the application of general maritime law; and, if allowed to stand, the majority opinion will invite spurious claims to every long-lost item of maritime recovery.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE FLORIDA BAR ADMIRALTY LAW COMMITTEE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Florida Bar is an organization of attorneys licensed to practice the profession of law within the State of Florida. It also includes members of the judiciary, academicians and others who are interested in the development and application of the law.

The Admiralty Law Committee is a subdivision of the Bar. Its members represent all interests in the field of admiralty and maritime jurisprudence. Members of the Committee regularly practice in, and are conversant with, the full breadth of issues, policy considerations and trends in admiralty and maritime law, including: marine insurance; cargo and the law of carriage; charter parties; collision; salvage; finds and wreck law; general average;

maritime liens and ship finance; limitation of liability; maritime pollution and products liability; the law of the sea and international maritime law; the law of marine technology and deep ocean discovery; the rights of seamen and maritime workers; maritime personal injury law; governmental activity and liabilities in shipping; and other related forms of maritime law. The Committee is fortunate to have special expertise in shipwreck and finds law, including its interrelationship with commercial salvage law, and substantial and ever-increasing litigation over these matters is occurring in the state and federal courts within Florida. Among the related cases that have occurred in our State are *Treasure Salvors, Inv. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985); *MDM Salvage Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 631 F. Supp 308 (S.D. Fla. 1986); *Cobb Coin Co. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981); *State v. Massachusetts Co.*, 95 So.2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1956); *Howard v. Sharlin*, 61 So.2d 181 (Fla. 1952).

The Board of Governors of the Florida Bar have authorized the Admiralty Law Committee to file this Brief in support of granting the Petition for Writ of Certiorari. The current Amicus Guidelines of the Florida Bar state that a Committee can act as an amicus curiae if (1) doing so is not inconsistent with an official position of the Bar; (2) the issue is within its area of subject matter interest; and, (3) the issue does not carry the potential of deep philosophical or emotional division among members of the Bar.

The Board of Governors has concluded that this case raises an important question of admiralty and maritime law in need of resolution by the Court. The issues, not the least of which is the application *vel non* of the maritime law of finds to supplement the law of salvage

with regard to determining title to items recovered from long-lost, abandoned shipwrecks are under current case law from the lower courts, hopelessly in conflict and in critical need of guidance from the Court. The consequences are legion as to the case load and forum shopping concerns of admiralty courts, the public administration of justice, effectuation of the intent of the Congress and the many state legislatures, potential liabilities of the federal and state governments, substantial amounts of sovereign property and protection and conservation of historic shipwrecks for present and future generations.

Stated differently, members of the Florida Bar have responsibilities that extend beyond their ethical duties to represent clients as zealous advocates (and their concomitant duties to their clients of competence, confidentiality and professionalism). They also have a fundamental duty to the society which has granted them the privilege of practicing their profession: the responsibility to assist objectively and impartially in improving the legal system. With a view to the weight they accord that responsibility to the public, and in light of (1) the landmark significance of the *S.S. Central America* case, (2) the intolerable conflict among the federal circuits and the state supreme courts on the substantial federal question presented, (3) the necessary effects of the decision below on federalism, federal-state cooperation, and state and federal property rights, (4) the practical impact on the case load of admiralty courts and the administration of justice, and (5) the national and international importance of the admiralty and maritime concerns raised, the Florida Bar Admiralty Law Committee respectfully urges the Court to grant certiorari.

REASONS FOR GRANTING THE WRIT

In addition to the reasons for granting the Petition stated in the Petition for Writ of Certiorari, the Committee is concerned that the existence of continued initiative in the private sector and the availability of pri-

vate risk capital is severely affected by the confusion, inconsistency and conflict among the federal circuits illustrated by the decision below. Not the least of these: although the *S.S. Central America* shipwreck was admittedly abandoned by its former owners, crew and master, the Fourth Circuit panel concluded that none of the cargo on such an abandoned long-lost shipwreck could be found by the district court to have been "abandoned" within the meaning of federal admiralty law, absent "an owner's express declaration abandoning title." Pet. App. 27(a). One of the many practical results of the Fourth Circuit's decision is that, once the finder has shown that the vessel itself was abandoned, it still has some "continuing" additional burden of proof to show the abandonment of *each and every item* recovered from the admittedly abandoned vessel, which must be proved by clear and convincing evidence of an express disclaimer of title. The jurisprudential and practical effects of the decision below create intolerable inconsistencies among the federal circuits, warranting the Court's attention.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE AN INTOLERABLE CONFLICT AMONG THE CIRCUITS AND THE STATE SUPREME COURTS

A. The Decision Below

The district court found that the wrecked vessel was abandoned and all items recovered from the wrecked and abandoned vessel had been abandoned by their owners and purported subrogees of the owners. The trial court rejected the proposition, put forward by the respondents, that no abandonment of portions of the cargo could be found because, "They [claimants] never signed any documents so stating, never made any public announcement of abandonment and have always claimed to own the gold." Pet.App. 97(a). The district court applied the maritime law of finds to supplement the law of salvage and awarded title to all recoveries to Columbus-America as the finder of the admittedly abandoned *S.S. Central America*. Pet.App. 102(a).

The majority of a sharply divided three-judge panel of the Fourth Circuit rejected the clear line of authority applying the law of finds to the law of salvage regarding long-lost shipwrecks. The majority held that these precedents are applicable only where no purported previous owner appears. Pet.App. 22(a). The court of appeals held that where any party purporting to claim ownership to any items salvaged from an admittedly abandoned shipwreck comes forward, the abandonment of that item cannot be found unless the finder proves by "clear and convincing evidence" that the claimant/owner or person holding a subrogation interest has made an "express abandonment". Pet.App. 20(a), 27(a). The majority Opinion of the Fourth Circuit held that the only thing that would satisfy its strict test of abandonment was "an owner's express declaration abandoning title" or the owner's failure to appear. Pet.App. 27(a). Since the insurance companies or their successors had either lost or destroyed all of their documents of title with regard to the claims, payment of the claims, assignment of subrogation interests, etc., (e.g., bills of lading, insurance policies, negotiable instruments), Petitioner was obviously unable to show that the insurance companies or their subrogees had signed a "formal document" or made a "public announcement" disclaiming their subrogation rights to some portion of the insured cargo, as required by the court of appeals.

The court of appeals accordingly remanded the case for the strict application of the law of salvage "unfettered" by the law of finds. The majority decision requires a determination of what "share" of the salvaged cargo each insurer should receive. The Court of Appeals held that the insurance companies could assert rights only to the "commerical shipments" of gold (insured or not). Thus, Columbus-America Discovery Group was entitled, in theory, to claim all of the passenger possessions which, "almost surprisingly" no descendent had attempted to claim. Pet. App. 28(a). To claim passenger possessions,

however, the decision below would require Columbus-America to prove, despite the total lack of documentation and the one hundred-thirty (130) years the items had spent beneath the ocean, that each item recovered from the wrecksite by Columbus-America was "more likely than not" a passenger possession, or "surplus" of gold over and above the value of the commercial shipment. *Id.*

Instead of finding that items salvaged from an admittedly abandoned shipwreck are themselves presumptively abandoned, the split panel held that title to all recoveries of gold was presumptively subrogated to the insurance companies or their purported successors who allegedly laid claims on some unidentified portion of the commercial cargo.

In a well-reasoned dissent, Judge Widener stated that requiring an "affirmative act" and express disclaimer of title for abandonment "cannot be reconciled" with the long line of maritime and common-law authority establishing the abandonment of a wreck (including the sunken vessel's tackle, cargo, apparel, etc.). He noted admiralty courts could infer abandonment from all the surrounding facts and circumstances. Pet. App. 42(a)-52(a). Judge Widener pointed out that the majority decision "breaks with the law of every other Circuit that has decided the question." Pet. App. 54(a). Judge Widener also criticized the majority for ignoring the Supreme Court's mandate (to the very same panel, on an earlier case) on review where there is a factual finding (abandonment) by the district court, and he expressed grave concerns over the majority's making factual findings on appeal. Significantly, Judge Hall (who had joined Judge Russell in the majority opinion) voted for consideration of the weighty issue by the full court in court of appeals' 5-7 split denial of rehearing *in banc*. Pet. App. 110(a)

B. The Conflict Among the Circuits

In addition to its many other errors, the majority opinion below makes the mistake of looking at the law of

finds as abolishing the law of salvage, rather than augmenting and fortifying it. Specifically, in conflict with the First, Fifth and Eleventh Circuits, as well as various state supreme courts, the majority opinion:

> —requires the first finder in possession to establish abandonment of each and every item recovered from the wrecksite of the abandoned vessel by express disclaimer of title.
>
> —allows all intervenors claiming an ownership or subrogation interest to make a claim against a commingled "salvage pool" composed of unidentifiable portions of cargo and passenger possessions that cannot be linked to specific persons.
>
> —applies an incorrect burden of proof to the claim of an intervenor against an item of salvage from an admittedly abandoned shipwreck site.
>
> —applies an incorrect standard of review to the District Court's factual findings concerning the presumptive abandonment of items recovered from an admittedly abandoned vessel.

By limiting the concept of abandonment of claims to the hull, tackle, apparel, engines and cargo (of an admittedly abandoned vessel) to cases where there has been express renunciation of title, the majority opinion effectively forecloses any supplementation of the law of salvage by the law of finds. In doing so, the majority opinion conflicts with the opinions of the courts of appeals, district courts, and state supreme courts. If allowed to stand, the majority opinion invites spurious claims to virtually every long-lost item of maritime recovery in the future.

The majority opinion fails to address admiralty's "personification" of a vessel or its "unitary approach" to wrecks, which heretofore treated a shipwreck site and its components as a legally unified *res*. The assault on common sense by the majority opinion is apparent when it is realized that the *S.S. Central America* is an admittedly abandoned ship wreck. While (at least in theory) a sin-

gle owner of an entire shipwreck or the owner of a subrogation interest to an entire wreck might arguably think to "affirmatively abandon" such an ownership or subrogation interest, it defies common sense and ordinary experience to suggest that an insurance company would ever, let alone be expected to, expressly disclaim subrogation rights to some unidentified part of an allegedly insured portion of a vessel, hull, tackle, cargo, passenger effects (whether personal articles, deck machinery, or other tangibles) which may have been lost on a vessel. The majority's holding would require the finder of a long-lost shipwreck to prove that even *after* an affirmative abandonment of a vessel by its owners, each insurance company expressly declare that it was abandoning its subrogation rights to whatever portion(s) of the hull, tackle, appurtenances, cargo, etc., of the abandoned vessel it had insured. The lapse of time, fading of memories, disappearance of witnesses and loss or distruction of documents makes such a test impractical, and even absurd, on its face.

II. THE COURT SHOULD GRANT REVIEW BECAUSE OF THE SERIOUSLY HARMFUL PRACTICAL EFFECTS OF THE DECISION BELOW

A. Effects on Federalism, State and Federal Property Rights and Historic Preservation

Although the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101 *et seq.* (Supp. 1992), does not apply to the *S.S. Central America*, which is outside the territorial jurisdiction of any state, the practical effect of the Fourth Circuit's decision will be to emasculate the Act, with immediate, intolerable and in many instances irreparable effects on federalism, state and federal property rights, and historic preservation. Under the Abandoned Shipwreck Act, the United States asserts title to "abandoned shipwrecks" within the (former) three mile territorial sea outside the nation's jurisdictional baselines. Except for those on federal reservations and parks, the United States then conveys title (and responsibility for preserva-

tion and management) to the States within whose territorial waters each lies.

Under The Act, the ownership or assertion of title to any shipwrecked property depends entirely on the construction of the term "abandoned shipwreck," which triggers the Statute's application. Nowhere in The Act is the term "abandoned" defined. The legislative history indicates that the federal statute was constructed on the accepted definition of abandonment that has been developed by the federal admiralty courts under article III, section 2 of the United States Constitution.

The legislative history demonstrates "the term abandoned does not require the original owner to actively disclaim title or ownership." H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 366. "Abandonment or relinquishment of ownership rights may be implied or otherwise inferred." *Id.* The decision below thus destroys the federal-state property interests in such shipwrecks and subjects state and federal governments to a host of title and inverse condemnation lawsuits. Conflicts and litigation will be multiplied, with continuing uncertainty and disagreement in different venues over the Abandoned Shipwreck Act and its effects. These are precisely the results the Congress tried to end because of then-existing conflicts of the circuits.

B. Effects on Private Funding for Scientific Research and Development

The opportunities for scientific research and development on long-lost and abandoned shipwrecks are tremendous. Such cultural deposits are unique laboratories, in many instances teeming with life forms and mysteries never before explored.

But the conflict among the circuits squanders opportunities for scientific research and development by making uncertain and unpredictable the financial incentives associated with technologically advanced discovery and recovery, thereby making it difficult, if not impossible, to at-

tract the enormous sums of private venture risk capital needed for such challenging ventures.

Conflict and confusion as to the applicable legal regime have a debilitating effect on deep-sea discovery and recovery. Without predictable legal rights, discoverers are paralyzed and unable to attract the huge sums of capital required for these inherently risky ventures. *See* 30 U.S.C. § 1401(a)(13) (uncertainty in legal regime discourages private investment). The Court's prompt attention is warranted to allow scientific research and development to resume and to progress.

C. Effects on the Administration of Justice By Admiralty Courts

The application of the law of finds to supplement the law of salvage was touched upon, but never resolved, by the Court in *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 677 & n.8 (1982) (Stevens, J.) (mentioning district court's application of the doctrine of *animus revertendi*, and the consequent vesting of ownership of items from long-lost shipwrecks in the finder).

The admiralty court's rationale for applying the law of finds to the law of salvage under the doctrine of *animus revertendi* is best explained by Judge Walter Hoffman's seminal 1960 decision *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452 (E.D. Va. 1960). Judge Hoffman reasoned that when the location of certain property is lost at sea and its owner makes no effort to go and find it, with the passage of time, non-use and based on the other facts and circumstances, admiralty courts may infer that the property—

> ceased to be the property of any person, and thenceforth is no man's property, unless and until it is reduced to possession within intent to acquire title to, or ownership of it. It may, accordingly, be appropriated by anyone, if it has not been reclaimed by the

> former owner, and ownership of it vests, by operation of law, in the person first lawfully appropriating it and reducing it to possession with intent to become its owner provided, it has been said, the taking is fair.

186 F. Supp. at 456. Under law of finds, a shipwreck site and all contents whose owner has no hope or intention of returning, may, based on the circumstantial evidence, be found to be abandoned and the party who finds it acquires ownership of the vessel and its contents. *See Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978); Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 15-7 (1987).

It should be noted that it is only when the law of finds is used to supplement the law of salvage that title to the actual *res* may be granted to the salvor. Under commercial salvage law, title always remains in the original owner. *See Cobb Coin Co. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 198 (S.D. Fla. 1981); *Platoro, Inc. v. Unidentified Remains*, 695 F.2d 893, 904 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983); *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801, 808 (S.D. aG. 1984), *aff'd without opinion*, 775 F.2d 302 (11th Cir. 1985).

The majority opinion holding that determination of whether property has been abandoned is anything other than a question for the admiralty court to be decided based on all the facts and circumstances and that, as a matter of law, an express disclaimer is required underscores the horrendous and unacceptable conflict among the circuits and state courts on a very basic issue of admiralty law—an issue which undergirds the legal framework for numerous developing bodies of jurisprudence. Under the common and maritime law, a formal declaration of abandonment was unecessary, and abandonment was inferred from all the relevant facts and circumstances —and certainly could be determined on the basis of circumstantial evidence. *See* 1 Am. Jur. 2d *Abandoned, Lost*

and Unclaimed Property § 40. The conflict and confusion over these fundamental doctrinal principles call for the Court's guidance to the lower courts, which are frequently asked to address similar or related issues.

Page upon page of citations would be necessary to even attempt to cover the application of the law of finds to supplement the law of salvage under the doctrine of *animus revertendi* (the owner has no intention of returning). The majority opinion of the Fourth Circuit has rejected a factual inquiry into all the circumstances that other circuits have employed to determine abandonment of long-lost shipwrecks. The dissent cited over a dozen cases and treaties for the proposition that abandonment is a question of fact. Yet, this axiomatic principle is totally unmentioned in the majority opinion. And, making the conflict even more intolerable, it is not just the majority opinion, as it applies to finding "abandonment" of shipwrecks which is in error. Without, at the very least, a rebuttable presumption that all salvage from an abandoned shipwreck is itself "abandoned", there is no end to the litigation for a finder in possession. The majority opinion below creates the illogical and pernicious presumption that all recoveries from the admittedly abandoned *S.S. Central America* are subject to the subrogation rights of the insurance claimants.

The result of the conflict is that the admiralty courts are faced with the burden of litigation over very possibly hundreds of claims of purported successors-in-interest of owners, insurers of hull, cargo, passenger effects, etc., with the hapless finder forced to bear the enormous legal and economic burden of trying to disprove such stale and speculative claims. The "Herculean task", Pet. App. 49(a) at n.7 (Widener, dissenting) facing the admiralty courts in having to try to sort out claims hundreds of years old, although a task perhaps rewarding to enterprising counsel who scavenge such long-lost claims, will fall on the admiralty courts, and those who choose to

continue to come before them, rather than secreting their finds or shopping for other, more favorable, forums.

D. The Effects on Private Incentives for Development of Marine Technologies and Ocean Exploration

There is already enough of a burden on an explorer to research, search for, find, recover and prove abandonment of a long-lost vessel by its former owners or one or more subrogated insurance companies. Once these considerable burdens have been carried, it is illogical and unconscionable to require the finder in possession by "express disclaimer of title" to prove "affirmative abandonment" of each item recovered from the abandoned shipwreck. The consequences of such a rule in undermining certainty and predictability cannot help but destroy or diminish incentives for development of marine technologies and ocean exploration. Anne G. Giesecke, *To Be Or Not To Be Abandoned*, Sea Technology, Jan. 1993 at 93.

III. THE COURT SHOULD GRANT REVIEW TO ADDRESS DEVELOPING BODIES OF JURISPRUDENCE ON RIGHTS OF INDIVIDUALS AND PRIVATE ENTERPRISE IN THE DEEP OCEAN AND OUTER SPACE

In addition to the other reasons for granting review, the dramatic developments in deep ocean discovery, and the technologically (and legally) related opportunities for private enterprise in outer space further warrant the Court's review. These developing fields of federal jurisprudence are burgeoning based on precedents and policy considerations in more traditional maritime endeavors.

It is worth noting that the Court has remained aware of the need to keep federal law current with the development of technology. *See e.g., Kats v. United States*, 389 U.S 347 (1967) (applying Fourth Amendment to elec-

tronic eavesdropping devices). *See also Maryland v. Craig*, 497 U.S. 836 (1990) (Sixth Amendment and closed-circuit transmissions); *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990) (life support systems and right to privacy); *Florida v. Riley*, 488 U.S. 445 (1989) (helicopter surveillance and Fourth Amendment).

The significance of technological developments for the *S.S. Central America* case, including landmark developments such as the new legal concepts of "telepossession" and "telepresence" (the use of live imaging through television, robots and remotely operated devices to achieve legal presence and control in extreme environments, including the deep ocean and outer space, where direct physical presence of human beings may be inefficient, impractical or too dangerous), thus makes review by the Court all the more important. *See* Drew F.T. Horrell, Note, *Telepossession is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery*, 3 Pace Y.B. Int'l L. 309, 338 (1991). These developments, including as to the issue of abandonment, provide the foundation for further progress in the law applicable to exploration and utilization of the oceans and outer space, from deep-sea mineral recovery to recovery of abandoned satellites and space debris. *See id. at 357 and authorities cited therein. See also The Emerging Law of Deep Ocean Discovery*, Harvard Law Bulletin 20 (Winter 1991).

The developments in the *S.S. Central America* case have been repeatedly recognized by commentators for their significance for these developing bodies of jurisprudence. *See e.g.* Wayne White, *Mining Law for Outer Space*, Proceedings, Tenth Biennial Space Studies Institute/ Princeton Conference on Space Manufacturing (Fall 1991). Much of developing law for the exploitation and utilization of space by individuals and private enterprise, as opposed to governments, is developing by analogy to, and precedents in, admiralty and maritime law. See H.

De Saussure, *The Application of Maritime Salvage Law to the Law of Outer Space*, Proceedings of the 28th Colloquium on the Law of Outer Space, Stockholm 1985.

These considerations are made all the more significant by the Court's constitutional responsibilities under Article III, Section 2 with regard to admiralty and maritime jurisprudence. The majority opinion below impinges on the uniformity of admiralty law and the application of general maritime law. As the Court pointed out in *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963):

> Article III of the Constitution vested in the Federal Courts jurisdiction over admiralty and maritime cases, and since that time, Congress has left to this Court the responsibility for fashioning the controlling rules of admiralty law.

The Court has long recognized its special role in fashioning the development of maritime law. A few years before *Fitzgerald*, in *S.W. Sugar and Molasses Co. v. River Term. Corp.*, 360 U.S. 411, 415 (1959), the Court had stated:

> The issue is one of importance in the development of the Law of Maritime as to which we have large responsibilities, constitutionally conferred . . . .

The Court's constitutional responsibilities are made all the more significant where, as here, the implications of the decision may substantially affect the uniformity of the general maritime law or otherwise impinge on the application of general maritime law—and, more importantly, bodies of federal jurisprudence developing to protect the rights of individuals and private enterprise in deep-sea and outer-space exploration and utilization. Resolution of the basic issue of abandonment is crucial to further development of the legal framework for these new fields of law, and, as a practical matter, indispensable to allowing individuals and private enterprise, not merely governments, to explore and responsibly utilize such remote environments.

CONCLUSION

The critical need for the Court's review of the issue herein was recently stressed by a leading admiralty expert from another State's bar:

> . . . More litigation will presumably result from this dispute over protection for this treasure-laden area.
>
> Other national and international incidents will be involved in the future. Beside the romance of buried treasure at sea and the stories surrounding it, there have been a plethora of legal battles since the technology for recovery has become so advanced. Submarine robots are now picking up treasure. *How the law of finds will turn out in cases on the high seas will need resolution by the Supreme Court. What proof is needed to show abandonment?*

Paul S. Edelman, *Admiralty Law: Who Gets Treasure Recovered From the Sea*, N.Y.L.J. Dec. 4, 1992 (emphasis added).

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE MARINE TECHNOLOGY SOCIETY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE MARINE TECHNOLOGY SOCIETY IN SUPPORT OF PETITIONER

The Marine Technology Society hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

Founded in 1963, the Marine Technology Society ("MTS") is an international professional society, devoted to ocean and marine engineering, science, and policy. The Society's members possess expertise in all of the disciplines involved in exploring, studying, and responsibly utilizing the world's seas. As an institution, MTS represents a broad array of marine-related interests, including businesses and industries, uniformed services, higher education, and agencies at all levels of federal, state/provincial, and local government. While marine technology is of vital concern to MTS, the Society's knowledge and in-

terests extend to the broad range of concerns implicated by the use of the marine environment as a resource for human betterment.

Exploration of long-lost and abandoned shipwrecks is essential to deep-sea exploration and provides a vehicle for continued technological inventiveness. Like new eras of human discovery in the past, the revolutionary age of underwater exploration has stemmed from the freedom and incentives of individuals to explore. Since World War II, there has been a great increase in the pace of opportunities for individuals to participate in underwater discovery. However, the discovery and recovery of submerged and maritime historical cultural resources depends heavily on advanced and costly specialized technologies. Financial incentives have often provided impetus for many of the needed technological innovations.

The decision below makes uncertain and unpredictable the financial incentives associated with technologically advanced discovery and recovery of material in the deep ocean. As a practical matter, it will be difficult, if not impossible, to attract the kind of responsible investors needed to underwrite the combination of scientific investigation, historical analysis and entrepreneurship exemplified by the *S.S. Central America* Project.

Moreover, the uncertainty regarding the applicable body of law creates the very real risk that future explorers will not enjoy the fruits of their exploration because they may be confronted with possibly hundreds of claims by those purporting to be successors-in-interest of former owners and insurers of long-lost shipwrecks, all claiming to be "owners," and the unfortunate explorers may be forced to bear the enormous legal and economic burden of disproving a multitude of stale claims. Thus, the decision below also threatens future exploration by subjecting explorers to a host of lawsuits, many of which may be based on evidence scores of years old, and by placing upon the explorer the burden of disproving speculative claims.

MTS believes that exploration and recovery of ocean resources—cultural and natural—should be encouraged, not inhibited. MTS is deeply concerned that if the Fourth Circuit's decision is allowed to stand, it may well jeopardize responsible research and exploration of the seas.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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February 16, 1993

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE MARINE TECHNOLOGY SOCIETY IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Marine Technology Society ("MTS") is an international professional society, devoted to ocean and marine engineering, science, and policy. Since its founding in 1963, MTS has been working toward the following objectives: (1) disseminating marine science and technical knowledge; (2) promoting and supporting education for marine scientists, engineers, and technicians; (3) advancing development of the tools required to explore, study, and utilize the oceans responsibly; and (4) providing services that create a broader understanding of the relevance of the marine sciences to other technologies, arts, and human affairs. Thus, while marine technology

is of vital concern to MTS, the Society's knowledge and interests extend to the broad range of concerns implicated by the oceans as a resource for human betterment.

The Society's members possess expertise in all of the disciplines involved in exploring, studying and responsibly utilizing the world's oceans. As an institution, MTS represents a broad array of marine related interests, including businesses and industries, uniformed services, higher education, and agencies at all levels of federal, state/provincial, and local government. The Society is vertically integrated as well; its membership ranges from CEO's, officers, and administrators, to professional engineers, scientists, and technicians.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE ISSUES ARE IMPORTANT AND WILL INCREASE IN SIGNIFICANCE

Although the world's system of oceans comprises nearly three-fourths of the surface of the earth, this watery regime remains largely unexplored because the hazards of doing so are significant and frequently unpredictable. Although the decision below, *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992), focuses on location and recovery of cultural resources, such as shipwrecks, the technology for such efforts is often similar to, and may impinge upon, location and recovery of natural resources on the seabed. Life threatening risks and extensive economic costs inhibit the discovery, management, and recovery of the sea's cultural and natural resources because they limit exploration to those governments and large enterprises able and willing to invest significant resources. To these existing inhibitions, the recent decision of the court of appeals adds a further deterrent to the few entrepreneurs capable of locating and recovering valuable cultural and natural resources from the ocean depths—the uncertainty of ownership. MTS believes that ex-

ploration and recovery of ocean resources—cultural and natural—should be encouraged, not inhibited, and accordingly asks the Court to grant a writ of certiorari to address the weighty issues presented.

A. Dramatic Developments in Technologies for Exploring and Utilizing the Marine Environment Have Made Conflicts in Applicable Federal Maritime Law Intolerable

The effort to locate, recover, and conserve the *S.S. Central America* provides a microcosm of the widespread significance of developing marine technologies. The *S.S. Central America* shipwreck lies on the seabed, nearly two miles below the surface.

Search theory and technology were critical to finding the location of the *S.S. Central America.* Columbus-America Discovery Group compiled a "data correlation matrix" the size of a bedroom—12 feet long by 12 feet wide—with every fact about the event listed horizontally and a timetable printed vertically. They took it to Larry Stone, who had helped find the lost U.S. submarine *Scorpion.* Building computer models of hundreds of sinking scenarios based on wind speeds, currents, and the *Central America*'s last known coordinates, Stone came up with a 1,200 square-mile rectangle of the Atlantic most likely to contain the wreck. The area—the size of Rhode Island—was broken into half-square-mile "cells", and most of the cells were assigned a number between 1 and 10,000 corresponding to the probability of it being the final resting place of the ship. To search the area, Columbus-America Discovery Group used side-scan sonar.

To conduct delicate operations in the extreme cold and crushing pressure of the deep ocean, Columbus-America Discovery Group designed *Nemo*, an innovative, unmanned, deep-ocean excavation vehicle. Because so little is known about the deep ocean environment, every piece

of information that can be recovered is essential to understanding such wrecksites and finding sunken resources.

With its robotic arms and tactile manipulators, *Nemo* can retrieve pieces of gold smaller than a dime. The vehicle uses archaeological tools, including a hydraulic dustpan and water jet, to recover delicate artifacts. It even employs a silicon injection system to solidify contiguous objects so that their relative positions are preserved when they are removed together from the ocean floor. *Nemo* also deploys a variety of instruments and sampling devices around the wrecksite.

People use both eyes to see the world in three dimensions. The remote controlled robot ("telebot") *Nemo* uses two cameras set slightly apart to serve as the "eyes" of the operators. Using 3-D vision, the team on board the surface vessel can direct *Nemo* to accurately grasp and retrieve artifacts and efficiently perform experiments. *Nemo's* stereo cameras, powerful illumination, and five camera booms for multiple perspectives are used in the most precise archaeological investigation ever to be recorded from start to finish. Three-dimensional images are transmitted to the surface vessel, allowing Columbus-America Discovery Group to have "telepresence" and excellent underwater depth perception without leaving the control room.

Illustrative of both the dramatic development of marine technology and the demands and benefits of ocean exploration, *Nemo's* operation is directed by a multi-disciplinary team of scientists and engineers who pool their knowledge and experience in a collegial approach to discovery from inside the ship's mission control center. *Nemo* absorbs sophisticated sensory information about the shipwreck and its environment and transmits the information directly to the mission control center aboard the research ship, where it is computer processed and instantly displayed for accurate analysis. *Nemo* can perform continuous operations at great depths and can carry along

a greater number of tools than manned submersibles and divers.

The impacts of exploration world-wide are certain to increase over time. With the advent of modern communications, whole nations have been able to participate in the process of discovery. *See Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 1989 AMC 1955, 1958 (E.D. Va. 1989) (discussing the doctrine of "telepresence"). *See generally* Drew F. T. Horrell, Note, *Telepossession Is Nine-Tenths of The Law: The Emerging Industry of Deep Ocean Discovery*, 3 Pace Y.B. Int'l L. 309 (1991).

B. Deep Sea Discovery, and Development and Enhancement of the Needed Marine Technologies, Are Vital National Concerns

The deep sea floor is many times larger than the surface world, and yet largely unexplored. George S. Fichter, *The Future Sea* 148 (1978). At present, only about five percent of the ocean floor has been adequately charted. Lloyd Mallon, *Secrets of the Sea* 40 (1965).

Exploration of long-lost and abandoned shipwrecks is an essential part of the requisite underwater discovery and provides a vehicle for continued technological inventiveness. *See The Sea Remembers* 7 (Peter Throckmorton ed., 1987); *see also* Christopher Lampton, *Undersea Archaeology* 12 (1988).

Like new eras of human discovery in the past, the emerging age of underwater exploration has stemmed from the freedom and incentives of individuals to explore. There has, since the Second World War, been a great increase in the pace of opportunities for individuals to participate in underwater discovery. Financial incentives have often provided impetus for many of these technological innovations associated with exploration. *See*

Jacques Cousteau, *The Ocean Worlds of Jacques Cousteau: Man Re-Enters the Sea* 16 (1974); *see also* Tzvetan Todorov, *The Conquest of America: The Question of the Other* 9 (1985).

Other important developments have opened up new opportunities for ocean exploration. Remotely operated vehicles (ROVs), which can now descend to depths of 20,000 feet, are used for a variety of purposes, including the location of mineral deposits and investigation of the planet's shifting tectonic plates. Equipped with mechanical arms, cameras, and sonar systems, ROVs permit a comprehensive view of the ocean depths for controllers on the surface. *The Sea Remembers* 220.

Using these improving technologies to explore long-lost and abandoned shipwrecks presents enormous opportunities to better understand the marine environment. A host of natural and social sciences, new fields of study, and opportunities are presented. The educational potential is enormous. *See generally The Sea Remembers* 9-10. And the potential resources are astounding; for example, it has been estimated that a fourth of all the gold and silver ever mined on earth is now on the seabed floor. Fichter, *supra*, 55.

These developments reflect "the policy of the United States to develop, encourage, and maintain a coordinated, comprehensive, and long-range national program in marine science for the benefit of mankind to assist in protection of health and property, enhancement of commerce, transportation, and national security, rehabilitation of our commercial fisheries, and increased utilization of these other resources." The Marine Resources and Engineering Development Act, 33 U.S.C. § 1101(a) (1988). Objectives expressed by Congress for the marine activities of the United States include:

(1) The accelerated development of the resources of the marine environment.

(2) The expansion of human knowledge of the marine environment.

(3) The encouragement of private investment enterprise in exploration, technological development, marine commerce, and economic utilization of the resources of the marine environment.

(4) The preservation of the role of the United States as a leader in marine science and resource development.

(5) The advancement of education and training in marine science.

(6) The development and improvement of the capabilities, performance, use, and efficiency of vehicles, equipment, and instruments for use in exploration, research, surveys, the recovery of resources, and the transmission of energy in the marine environment.

(7) The effective utilization of the scientific and engineering resources of the Nation, with close cooperation among all interested agencies, public and private, in order to avoid unnecessary duplication of effort, facilities, and equipment, or waste.

(8) The cooperation by the United States with other nations and groups of nations and international organizations in marine science activities when such cooperation is in the national interest.

33 U.S.C. § 1101(b) (1988).[1]

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[1] Congress has further found that:

(1) Technology and industrial innovation are central to the economic, environmental, and social well-being of citizens of the United States.

(2) Technology and industrial innovation offer an improved standard of living, increased public and private sector productivity, creation of new industries and employment opportunities, improved public services and enhanced competitiveness of United States products in world Markets.

. . . .

[Continued]

It is similarly the policy of the United States "to encourage the continued development of technology necessary to recover the hard mineral resources of the deep seabed." 30 U.S.C. § 1401(b)(5).

C. Responsible Deep Ocean Technology and Discovery Require Substantial Venture Capital, and Merit Predictable and Clear Title to Finds, and Failure to Award Clear Title Will Spur Secretiveness By Discoverers and Loss of Information to Society

Throughout its history, admiralty law has governed the rights of individuals, primarily on the surface of the seas. "But technological advances, which make possible the recovery of the *Central America*, including the use of side-scan sonar and robots, required that the law address new circumstances beneath the surface of the deep ocean." *The Emerging Law of Deep Ocean Discovery*, Harvard Law Bulletin 20 (Winter 1991).

The discovery and recovery of submerged and maritime historical cultural resources depends heavily on advanced and often costly specialized technologies. Such locational and recovery technologies as side-scan sonar, sub-bottom profilers, magnetometers, and remotely operated vehicles are often expensive, and only the best financed users can acquire and appy them. U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation–Background Paper*, OTA-BP-E-37 8 (1987).

The court of appeals' decision with regard to the maritime law of finds is significant and affects many scientific

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[1] [Continued]

(4) Small businesses have performed an important role in advancing industrial and technological innovation.

(5) Industrial and technological innovation in the United States may be lagging when compared to historical patterns and other industrialized nations.

15 U.S.C. § 3701 (1988).

institutions. If allowed to stand, the decision may well chill future deep ocean research and exploration and the attendant development of recovery technologies. The decision makes uncertain and unpredictable the financial incentives associated with technologically advanced discovery and recovery of deposits in the deep ocean, such as historic shipwrecks. The resulting lack of predictability will most likely make it difficult to attract the enormous sums of private risk capital—and the enterprising explorers—required for such tenuous and challenging ventures.

II. THE DECISION BELOW WARRANTS REVIEW IN ORDER TO CLARIFY THE RIGHTS ASSOCIATED WITH MARINE DISCOVERIES AND THE BURDEN OF PROOF ASSOCIATED WITH QUIETING TITLE TO CULTURAL DEPOSITS FOUND ON THE SEABED

The law in this country has traditionally sought to protect the rights of innovators, inventors, and discoverers. The close connections between discovery, freedom to discover, and economic incentives for discovery did not escape our nation's founders. *See, e.g.*, Arthur Miller & Michael Davis, *Intellectual Property* 7 (2d ed. 1990). The fact that the modern science of oceanography began in this country was not by chance.

The framers of the Constitution were aware that protecting discoverers and their "finds against unknown savages and unfriendly rivals," was of vital importance because they understood the linkage between discovery and invention. *See* Daniel J. Boorstin, *Discoverers and Inventors, in Inventors and Discoverers: Our Changing World*, 8 (National Geographic ed., 1988). In modern times, the role of exploration has been combined with that of invention, as exploration and invention "have been assimilated into a single community of questing mankind." *Id.* at 10. "The face of exploration began to change drastically during the course of the twentieth

century . . . . The technology necessary for these new steps was far more complex than anything required of previous generations, and the result was a move away from individual efforts toward enormous undertakings that relied on massive support crews . . . and astronomical bankrolls." Eric Flaum, *Discovery: Exploration Through the Centuries* 191 (1990). Indeed, Congress and the President have codified the nation's long-standing tradition of encouraging exploration and discovery in the oceans. Title 33 U.S.C. Section 1101(b) places within our national objectives "expansion of human knowledge of the marine environment," and "encouragement of private investment enterprise in exploration, technological development . . . and economic utilization of the resources of the marine environment." E. John Long, *New Worlds of Oceanography* 24-25 (1965).

The conflict in case law over application of the law of finds or the law of salvage to discoveries by explorers warrants the Court's attention. The decision below creates a conflict in the circuits regarding the rights of explorers to their finds. Paul S. Edelman, *Who Gets Treasure Recovered From Sea*, N.Y. L.J., Dec. 4, 1992, at 3, 4 (discussing the change in law effected by the Fourth Circuit opinion, concluding: "How the law of finds will turn out in cases on the high seas will need resolution by the Supreme Court.")

The uncertainty over the applicable body of law creates the very real risk that future explorers will not enjoy the fruits of their exploration because they may be confronted with possibly hundreds of claims of purported successors-in-interest of owners and insurers, all claiming to be "owners," and the unfortunate explorer may be forced to bear the enormous legal and economic burden of disproving dozens, if not hundreds, of stale claims. Yet, the costs and risks inherent in exploring the seas are difficult enough without a blight of litigation. *See* Long,

New Worlds 36; *see also* J. Barto Arnold, *The Platoro Lawsuit: The Final Chapter*, Proceedings of the Sixteenth Conference on Underwater Archaeology 1, 7 (1985) (describing the burdens on exploration resulting from protracted and expensive litigation under commercial salvage law). As the Court has stated as to analogous concerns with respect to undue claims to jurisdiction, "it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by the sea." *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953). At the very least, the uncertainty and lack of predictability created by this conflict in the applicable body of law chills exploration of long-lost wrecks, and more seriously, raises the specter of economically crippling certain elements of the emerging field of deep ocean discovery.

The uncertainty about the applicable body of law threatens future exploration by subjecting explorers to a host of lawsuits, many of which may be based on evidence scores of years old, and by placing upon the explorer the burden of disproving speculative, aged claims. Imposing a yoke of uncertainty, and in some instances expensive and lengthy litigation, could hamper future explorers who are already burdened by the enormous cost and risks inherent in exploring the unknown. Anne G. Giesecke, *To Be Or Not To Be Abandoned . . .* Sea Technology, Jan. 1993, at 93.

Conflict and confusion as to the applicable legal regime have a debilitating effect on deep sea discovery. Without predictable legal rights, innovators, inventors, and discoverers are paralyzed, and unable to attract the huge sums of private investment capital needed. As the Congress has recognized in another context; "[T]he uncertainty among potential investors as to the future legal regime is likely to discourage or prevent the investments necessary" to develop deep sea technology. 30 U.S.C. § 1401(a)(13).

Yet, the law has heretofore accorded substantial rights to discoverers. *See Martin v. Lessee of Waddell*, 41 U.S. 367, 409 (1842) (recognizing discovery as a foundation for ownership); *Dunbar v. Meyers*, 94 U.S. 187 (1876) (intellectual property rights associated with discovery); *U.S. v. Safe Investment Gold Mining Co.*, 258 F. 872, 877 (8th Cir. 1919). *See also Lampton*, *supra*, 86 (discussing rights of explorers in shipwrecks).

As a practical matter, it will be, difficult, if not impossible, to attract the kind of responsible investors needed to underwrite this combination of scientific investigation, historical analysis and entrepreneurship. Certainly, the marine insurance community has neither funded such efforts in the past, nor done anything whatsoever to promote them. And indeed, insurers claiming based on subrogation, like heirs of passengers, crew members and the host of other claimants created under the majority's emasculation of the law of finds, have no incentive to do so: unlike a finder, who is required, under the maritime law of finds, to protect the scientific and historical values of long-lost shipwrecks, these claimants are under no such duty. On the contrary, such claimants have virtually no incentive to do so and their financial interests are limited to only a small part of the value of the shipwreck site. Giesecke, *supra*, at 93.

The freedom of individuals to explore the deep seas and to enjoy the benefits of their exploration appears to be part of the elements of the traditional freedom of the seas underlying our nation's maritime jurisprudence. *See e.g.* 30 U.S.C. § 1401(a)(12); 30 U.S.C. § 1402(a). Predictability and certainty in legal rights are essential to the exercise of these freedoms by innovators and discoverers, and they and their discoveries should not be subjected to a host of conflicting legal regimes. On the contrary, they should enjoy a clear, certain reward, without their energies, creativity, and investment capital being consumed in expensive and protracted litigation over claims stale for hundreds of years.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF ACADEMIES OF SCIENCE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF THE ACADEMIES OF SCIENCE IN SUPPORT OF PETITIONER

The National Association of the Academies of Science hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the respondents have refused to consent to the filing of this brief; counsel for the petitioner has consented.

The National Association of Academies of Science is comprised of 45 member academies and is devoted to promoting scientific inquiry, advancing education and

fostering practical and theoretical progress in science. The Association believes that the preservation of incentives to engage in scientific inquiry is a matter of great significance to us all. For instance, attempts to improve our quality of life have led scientists into previously unexplored areas, leading to breakthroughs in many fields, from medicine to bio-science and improved technologies. The earth's seas provide virtually untapped promise for advancing numerous fields of scientific study.

While the possibilities for scientific information from new discoveries in the deep seas are virtually limitless, and the practical benefits many, the ability and opportunity to conduct the costly and time-consuming research necessary for such endeavors is greatly diminished when scientists and engineers are subject to protracted and expensive litigation over stale claims. The location and conservation of submerged and maritime historical cultural resources depends on costly specialized technologies. The ability of explorers to obtain financial backing, either through private venture capital or commercial loans, will usually hinge on their ability to assure clear title to their finds, and to convey good and clear security interests. In undermining such clear title for finders, the practical effect of the conflict among the circuits over whether admiralty courts may infer abandonment of long-lost shipwrecks will be to impede opportunities presented for scientific research in the deep seas. The immediate effect of the decision below is to undermine certainty and predictability of the incentives for innovative exploration. When a discovery team of scientific researchers, supported by private financial investment, can no longer be assured of their ownership right to material they recover, continued advanced deep ocean exploration will suffer.

The Fourth Circuit's decision threatens not only deep sea exploration, but space exploration as well. Because the untamed frontiers of both deep ocean and outer space pose many of the same challenges to any human presence,

legal practices and rules affecting human presence in the ocean will likely influence those in outer space.

Moreover, realizing the full educational and scientific potential of shipwrecks requires that they be treated as integral. If a responsible group, such as Columbus-America Discovery Group, is prevented from carrying its work to completion, no scientists, explorers, archaeologists, or entrepreneurs will risk undertaking such enormously expensive projects; and they certainly will have little ability to promote the kind of scientific and educational programs that might be otherwise available.

Dividing shipwreck sites into a multiplicity of ownership interests, based on ancient claims of ownership, will disrupt their scientific and historic integrity. If the court of appeals' decision stands, it will aid only those groups that sit on the sidelines and wait for a judicially-created windfall from the hard work and ingenuity of others. If such multidisciplinary efforts are not undertaken, we will all be the losers.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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February 16, 1993

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF OF THE NATIONAL ASSOCIATION OF ACADEMIES OF SCIENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The National Association of Academies of Science is comprised of 45 member academies and is devoted to promoting scientific inquiry, advancing education and fostering practical and theoretical progress in science. It encourages all scientific disciplines, in all parts of the nation. The National Association is especially active in stimulating young people interested in science, and works closely with junior and collegiate academies of science to support scientific research at the high school and collegiate levels. Because it believes that the law should encourage science by fostering the fundamental national tradition that vision, hard work and ingenuity pay off—and because the court of appeals' decision sends precisely the

opposite message to the young people of our nation—the National Association of Academies of Science believes this matter warrants the Court's attention.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE ISSUE IS IMPORTANT TO SCIENTISTS, EDUCATORS AND YOUNG PEOPLE THROUGHOUT THE NATION

The court of appeals' decision has sent shock waves throughout the scientific community. It has baffled not only oceanographers, explorers, and discoverers, but also individuals and institutions representing a broad range of scientific, pharmacological, technological, and biological interests. The court of appeals' holding, in practical effect, that admiralty courts may no longer apply common sense to consider the circumstantial evidence and infer abandonment—and instead, that the finder of a long-lost item at sea must prove express abandonment by clear and convincing evidence—is contrary not only to the weight of authority, but also to virtually all credible precedents. More fundamentally, the notion that a loose consortium of insurance companies, which never stepped forward to assist in exploration or recovery efforts in any way, can appear in court at the last minute and successfully strip a team of engineers, scientists and explorers of the fruit of many years of vision, initiative, risk, and hard work shocks the national conscience.

A. The Decision Below Has a Stifling Effect on Nascent Scientific Endeavors To Develop New Medicines, Advance Bio-Science and Improve Technologies In the Deep Seas

The preservation of incentives to engage in scientific inquiry is a matter of great significance to us all. Attempts to improve our quality of life have led scientists into previously unexplored areas, leading to breakthroughs

in many fields, from medicine (including discoveries that may some day allow us to fight or slow diseases such as cancer and AIDS), to bio-science and materials science, to improved technologies and communications generally (especially in the area of fiber optics). The earth's seas provide virtually untapped promise for advancing these fields of scientific study.

The practical effect of the court of appeals' decision will be to detract from the opportunities presented. The immediate effect of the decision is to undermine certainty and predictability of the incentives for innovative exploration. Beyond that, the decision raises the specter that future projects will be unable to support the scientific research and effort that have been hallmarks of the *S.S. Central America* Project. *See generally* Charles E. Herdendorf, *Discovery in an Alien Environment*, American History Illustrated, Mar.-Apr. 1991, at 66. As noted by the district court, Columbus-America Discovery Group's recovery efforts have been exemplary. *Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 1989 AMC 1955, 1958 (E.D.Va. 1989). Columbus-America Discovery Group has developed new technologies and applications for maintaining the scientific and historical provenance of the *S.S. Central America*, thus preserving information and artifacts for future generations. *Id.* If the court of appeals' decision stands, it will aid only those groups that sit on the sidelines and wait for a judicially-created windfall from the hard work and ingenuity of others.

While the possibilities for scientific information from new discoveries in the deep seas are virtually limitless, and the practical benefits many, the motivation to conduct the costly and time-consuming research necessary for such endeavors is greatly diminished when scientists and engineers are subject to protracted and expensive litigation over stale claims.

Advances in marine technology have enabled exploration and expanded our knowledge of the deep ocean. "The last twenty to thirty years has produced a revolution in the knowledge of the seabed. In spite of this knowledge, we are still in the pioneering state of exploration of this very large area of the earth's surface." Conrad G. Welling, *Mining of the Deep Seabed in the Year 2010*, 45 La. L. Rev. 1249, 1254 (1985). Technological innovations have led to great improvements in underwater electronics and sensors, including television and data handling, and underwater lighting and photography. *Id.* The development of complex robots such as *Nemo*—which was created by Columbus-America Discovery Group to recover artifacts from the *S.S. Central America*—was itself a useful contribution to the emerging technology of mineral exploration. *See Id.* at 1257.

To the financial backer of such technology, however, "the technology may not be available until a respectable return on investment is obtained." *Id.* at 1262. Indeed, "cost remains the most prohibitive factor" in deep sea exploration. Drew F. T. Horrell, Note: *Telepossession is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery*, 3 Pace Y.B. Int'l L. 309 (1991). Unlike shallow-water efforts, the costs involved in finding and recovering long-lost property in the oceans' depths are substantial, running into the many millions of dollars for projects that often are unlikely to yield a dime.

In this case, the district court's award of title to Columbus-America Discovery Group, based on its telepossession of the wreck, had enabled Columbus-America Discovery Group to continue expending vast amounts of resources, time, effort and scientific analysis, in the confidence that its rights to the *S.S. Central America* were protected. The opportunity of such scientists and engineers to perform scientific experiments and observe scientific phenomena at the *S.S. Central America* wreck site was possible only as a result of Columbus-America Discovery Group's ability to rely on the certainty and pre-

dictability that its rights to its discovery would be protected under the law of finds.

The location and conservation of submerged maritime historical and cultural resources similarly depends on advanced, and often costly and highly specialized technologies. Working underwater is hazardous and difficult, especially in the deep seas. Locational technologies such as side-scan sonar, subbottom profilers, magnetometers, and remotely operated vehicles can be prohibitively expensive, and the scientists and explorers who use them must be able to rely on the predictability of their rights in the find. U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation—Background Paper*, OTA-BP-E-37, 8 (1987). Their ability to obtain financial backing, either through private venture capital or commercial loans, will usually hinge on their ability to assure clear title to their finds, and to convey good and clear security interests.

B. The Decision Below Impedes Pioneering Scientific Efforts in the Deep Seas, Outer Space and Other Extreme Environments

Because of its practical effects in undermining the reasonable assurance scientists previously had of their rights to their finds and discoveries, the decision below, if allowed to stand, will likely undermine future scientific research and exploration in the deep seas. The decision makes uncertain and unpredictable the financial incentives associated with technologically advanced discovery and recovery of deposits in the deep ocean, such as historic shipwrecks. The resulting lack of predictability will make it difficult to attract the enormous sums of private risk capital—and the enterprising scientists and engineers—required for such tenuous and challenging ventures. When a discovery team of scientific researchers, supported by private financial investment, can no longer be assured of their ownership right to that which they recover, continued advanced deep ocean exploration will suffer.

Many important advances in science have been made possible as a result of Columbus-America Discovery Group's perseverance. Columbus-America Discovery Group's scientists are performing eight types of experiments that fall generally within the fields of bioscience, physical and chemical studies, and historical analysis. These experiments include (1) deterioration of metal objects; (2) microbiological studies; (3) wood degradation studies; (4) indexing abyssal fauna; (5) concentration and composition of the food chain; (6) sedimentation studies; (7) biomedical and biochemical research; and (8) development of historical information. The scientific efforts have already led not only to discovery of eleven new species of marine life (some of which hold great potential for medical applications), but also to advances in our knowledge in a variety of areas.

Like exploration of the deep seas, space exploration will likely suffer adverse effects if the decision below is allowed to stand. Because the untamed frontiers of both the deep ocean and outer space pose many of the same challenges to any human presence, legal practices and rules affecting human presence in the ocean will likely influence those in outer space. Many of the same issues affecting explorers and scientists in the deep seas will arise, and the space explorers will analogize to issues in deep ocean discovery, such as the concept of "telepresence." H.H. Almond, Jr., *Sea Salvage Law Could Solve Chaos of Space Debris*, Defense News, Dec. 10, 1990, at 34. The deleterious effects of the court of appeals' decision may thus extend beyond the deep seas, into future developments in other remote environments.

C. The Decision Below Squanders Educational Opportunities in the Deep Seas

Deep sea exploration presents enormous educational opportunities, perhaps even exceeding the potential of the deep oceans for advancing scientific research. Columbus-America Discovery Group's efforts to present seminars for

young people interested in scientific careers, to develop radio broadcasts through ham radio operators and to create two interactive laser disc videos on "Investigating Science" and "Investigating History" illustrate this potential. *See generally* Horrell, *supra.*

For example, the *S.S. Central America* Project has given students the opportunity to learn how the efforts of such scientists and entrepreneurs led to the discovery of eleven new species of sealife. Students learn how experiments are currently being performed on some of these species in the hope of discovering antigens to be used in the fight against cancer and other diseases and how others are being studied. Other species are being studied to assist in food production. The incentives provided by the repose, certainty, and predictability of the maritime law of finds had, heretofore, allowed a team of chemists, biologists, oceanographers and historians to discover an extraordinary deep sea community of life forms, to recover a lost part of America's heritage and to provide educational programs in museums across the country.

If a responsible group such as Columbus-America Discovery Group is prevented from carrying its work to completion, no scientists, explorers, archaeologists, or entrepreneurs will risk undertaking such enormously expensive projects; and they certainly will have little ability to promote the kind of educational programs otherwise available. If such multidisciplinary efforts are not undertaken, we will all be the losers.

Moreover, realizing the full educational and scientific potential of shipwrecks requires that they be treated as integral. A study of shipwrecks must be multidisciplinary; ocean engineering, marine biology, navigation, probability analysis and mathematics, and oceanography —as well as a host of other natural sciences—play an important role, and all provide an opportunity for teaching.

Dividing shipwreck sites into a multiplicity of ownership interests, based on ancient claims of ownership,

would disrupt their scientific and historic integrity and unity. It would remove important scientific information from its context.

II. THE DECISION BELOW IS IN CONFLICT WITH THE OTHER CIRCUITS AND STATE SUPREME COURTS, AND SENDS THE WRONG MESSAGE TO OUR NATION'S YOUNG PEOPLE

The court of appeals' decision breaks with long-established precedent recognizing the ability of admiralty courts to draw an inference of abandonment based on circumstantial evidence. The decision below adopts a rule —unprecedented in cases dealing with long-lost shipwrecks —which, as a practical matter, imposes an impossible burden of proof upon the finder. In any case where a person purported to have succeeded to the interest of an original owner appears, the finder must prove abandonment by clear and convincing evidence, "such as an owner's express declaration abandoning title." *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 464 (4th Cir. 1992). In the case of shipwrecks lost for many decades, witnesses and documents will be unavailable to meet this burden and, without the ability to draw factual inferences of abandonment based on the totality of the circumstances, admiralty courts will have to award title to those interposing stale, puffed-up and perhaps fraudulent claims. And to the extent that scientists developing evidence through their exploration link specific long-lost objects to particular claimants, they will be similarly penalized, and conversely, have a disincentive to develop such information. Science will suffer.

This sends the wrong message to our nation's young people who are considering science as a career. A rule of law that penalizes advances in marine technology, scientific inquiry and learning is wrong. The law should encourage, rather than discourage, the scientific acquisition of knowledge.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL MARITIME HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1189

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et. al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL MARTIME HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

The National Maritime Historical Society hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The National Maritime Historical Society was founded in 1963 and currently has more than 12,500 members.

The objective of the National Maritime Historical Society is to educate and challenge people by increasing their awareness and appreciation of our maritime heritage. The Society believes that understanding our past, including our maritime history, is vital to meeting the problems of the present and preparing for the challenges of the future.

The Society is vitally concerned about the destructive impact that the decision below will have upon the preservation of our maritime history. Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but for future generations, as well. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

Upon a finding of abandonment, the maritime law of finds acts to protect the totality of interests in historic shipwrecks. Conversely, the law of commercial salvage imposes no such duty, and encourages salvors and other claimants to carve shipwrecks up into sections, thereby destroying all of the irreplaceable information that can be gleaned from studying shipwrecks as a whole. *See* Nicholas J.J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990*, 16 Tul. Mar. L.J. 1 (1992). If, as the Fourth Circuit held, abandonment cannot be inferred as a fact from circumstantial evidence, we risk losing forever a window into the past and the opportunity to study and share our rich cultural heritage.

Equally important, the new rule established by the decision below will encourage concealment, and perhaps outright destruction, of historical information by finders of long-lost shipwrecks. Much of this information is irreplaceable, and could well be lost to all generations to come.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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February 16, 1993

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE NATIONAL MARITIME HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The National Maritime Historical Society was founded in 1963 and currently has more than 12,500 members. The objective of the National Maritime Historical Society is to educate and challenge people by increasing their awareness and appreciation of our maritime heritage. Fundamentally, the Society believes that understanding our past, including our maritime history, is vital to meeting the problems of the present and preparing for the challenges of the future. Hence, the Society seeks to foster and promote maritime knowledge through a broad spectrum of educational programs in sea history, including programs sponsored at museums, secondary schools, and universities, regarding historic ship preservation,

ship building, seamanship, marine art, and literature of the sea. The Society also maintains a national library and biographical archives, publishes a number of educational materials, serves as a clearinghouse for information on historic shipwrecks, and raises funds to help save and restore certain ships.

The Society believes that if the Fourth Circuit's decision is allowed to stand, it could effectively end, and certainly will impede, the type of responsible recovery of historic shipwrecks undertaken by Columbus-America Discovery Group. Because of its concern over the destructive impact the decision below will have upon the preservation of our maritime history, the National Maritime Historical Society respectfully requests that the Court grant review.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATE SUPREME COURTS ON WHETHER ADMIRALTY COURTS MAY FIND ABANDONMENT OF LONG-LOST SHIPWRECKS BASED ON CIRCUMSTANTIAL EVIDENCE

The maritime law of finds applies "in extraordinary cases, . . . where the property has been lost or abandoned for a *very long* period." *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981) (emphasis added). Affirmative abandonment, while sufficient to satisfy the maritime law of finds, is not a requirement. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987).

The maritime law of finds is particularly applicable to the special category of long-lost historic wrecks and treasure salvage. *See Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d

330 (5th Cir. 1978). The maritime law of finds has become the overwhelming law of the land for adjudicating rights to long-lost wrecks. The circuit courts of appeal are in conflict on the issue. *See, e.g., Martha's Vineyard*, 833 F.2d 1059; *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985). The overwhelming majority of district courts recognize the maritime law of finds. *See, e.g., MDM Salvage, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308 (S.D. Fla. 1986); *Indian River Recovery Co. v. The China*, 645 F. Supp. 141 (D. Del. 1986); *Commonwealth v. Maritime Underwater Surveys, Inc.*, 1987 A.M.C. 2590 (Mass. 1987), *aff'd*, 1989 A.M.C. 425 (Mass. 1988); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1982); *Platoro Limited, Inc. v. Unidentified Remains of a Vessel*, 518 F. Supp. 816 (W.D. Tex. 1981), *aff'd in part, vacated in part*, 695 F.2d 893 (5th Cir. 1983); *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd without opinion*, 775 F.2d 302 (11th Cir. 1985).

Historically, state courts have also held that title may be divested from past owners of shipwrecks by inferring abandonment after the passage of 40 years or less. *See, e.g., Eads v. Brazleton*, 22 Ark. 499 (1861) (28 years—"undoubtedly abandoned"); *Deklyn v. Davis*, 1 Hopk. Ch. 135 (N.Y. Ch. 1824) (40 years—"abandoned and derelict"); *Creevy v. Breedlove*, 12 La. Ann. 745 (1857) (23 years—"clearly derelict"); *State v. Massachusetts Co.*, 95 So.2d 902 (Fla. 1956) (en banc), *cert. denied*, 355 U.S. 881 (1956) (34 years—"wrecked and derelict"). The substantial weight of authority rejects claims of original owners eroded by time, non-use, or other circumstances. *See, e.g., Wyman v. Hulburt*, 12 Ohio 81 (1843) (finder awarded title over undisputed original owner of cargo); *Steinbraker v. Crouse*, 169 Md. 453 (1936) (assignee of company's rights in 169 vessels that sank in a bay adjacent to its property lost title to new finders/

salvors of scrap off the vessels); *Howard v. Sharlin*, 61 So.2d 181 (Fla. 1952) (finder of lead keel in schooner prevails over putative owner because schooner was "derelict"). *See also United States v. Smiley*, 27 F. Cas. 1132 (C.C.N.D. Cal. 1864) (No. 16,317); *Thompson v. United States*, 62 Ct. Cl. 516 (1926); *Creevy v. Breedlove*, 12 La. Ann. 745 (1957); *Deklyn v. Davis*, 1 Hopk. Ch. 135 (N.Y. Ch. 1824).

Intertemporal legal analysis is particularly instructive in determining nineteenth century legal and business practices regarding title to items lost at sea. *Eads v. Brazleton* is a typical case from the era of the *S.S. Central America*. In awarding the wreck of the steamboat *America* to the finder after apparent abandonment for 28 years, the court stated: "in extreme cases property wholly derelict and abandoned has been held to belong to the finder against the former owner." 22 Ark. at 509. *See also State v. Massachusetts Co.*, 95 So.2d at 905 (summarizing ancient law). Today in the United States, there is a presumption, under 33 U.S.C. § 414, that a sunken vessel is abandoned if not removed from a navigable channel within 30 days.

United States v. Smiley is also instructive. When one of the *S.S. Central America's* sister ships, the *Golden Gate*, sank in 1862, the California court determined that the ship and its cargo—which had included over $1,000,000 in gold—was abandoned after less than two years. 27 F. Cas. at 1134.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE CONSERVATION OF OUR NATION'S HISTORICAL AND CULTURAL HERITAGE, INCLUDING DETERMINATION OF TITLE TO LONG-LOST AND ABANDONED SHIPWRECKS, IS AN IMPORTANT NATIONAL QUESTION

A. Congress and the President Have Expressed the National Policy of Conserving Historical and Cultural Materials, Including Shipwrecks and Sunken Cultural Deposits

Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but for future generations, as well. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

Because of the importance of preserving our country's rich cultural and historical heritage, Congress passed the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, in 1966. The Act establishes the policy of the United States of supporting the preservation of historical resources through a cooperative effort of federal, state, and local governments, and, contributing to "the preservation of nonfederally owned prehistoric and historical resources and giv[ing] maximum encouragement to organizations and individuals undertaking preservation by private means." 16 U.S.C. § 470-1(4). Congress' efforts to protect historic resources stem from the understanding that "preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. § 470(b)(4).

In 1971, President Nixon reiterated this country's commitment to preserving our historical and cultural past by issuing an executive order calling for the federal government to restore and maintain federally owned objects of

historical, architectural, or archaeological significance, and to ensure that federal programs contribute to the preservation of non-federally owned sites, structures, and objects. Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971). The Executive Order also directs the federal government to take a leadership role in maintaining our country's historical and cultural heritage to ensure its preservation for future generations. *Id.*

The national policy of protecting historical and cultural resources extends to underwater sites. For example, Congress passed, and President Reagan signed into law, the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101 *et seq.*, because of the importance of long-lost and abandoned shipwrecks to the historical and cultural heritage of the United States. The Act recognizes the need to "allow for the appropriate public and private sector recovery of shipwrecks consistent with the historical values and environmental integrity of the shipwrecks and the sites." 43 U.S.C. § 2103(a).

This national policy of protecting long-lost and abandoned shipwrecks, and other underwater cultural deposits, has been expressed, at various times, in other forms. *See, e.g.*, The Marine Sanctuaries Act, 16 U.S.C. § 1431 *et seq.* (1988) (amended 1992) (allowing the federal government to designate an area of the marine environment as a sanctuary based, *inter alia*, on the "historical, cultural, archaeological or paleontological significance" of the site involved. 16 U.S.C. § 1433(b)(1)(B)).

B. The States Have Expressed the National Policy of Conserving Historical and Cultural Materials, Including Shipwrecks and Sunken Cultural Deposits

Even before the passage of the Abandoned Shipwreck Act, most states and territories had recognized the national public policy of conserving underwater cultural resources, such as long-lost and abandoned shipwrecks. In fact, 27 states had already enacted historic preservation statutes pertaining to abandoned shipwrecks or

underwater historical property. H.R. Rep. No. 514(I), 100th Cong., 2nd Sess. 1, 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 366. While these states' statutes pre-dated the Abandoned Shipwreck Act, they were directed to similar concerns.

Like federal efforts, state programs have been directed toward the responsible recovery and conservation of items from the sea. Of similar importance have been concerns over the protracted and costly litigation spawned over confusion in the law governing abandoned shipwrecks. Yet, these same concerns are now effectively reinstated by the decision below.

C. The Issue of Whether Admiralty Courts May Continue to Infer Abandonment of Long-Lost Shipwrecks is Important to the National Policy of Conserving Our Historical and Cultural Heritage

The issue of when long-lost shipwrecks are effectively abandoned is a question of first impression for the Court, on which the circuits are in conflict. Although the question of what rights accrue to a finder or salvor upon locating a shipwreck can be traced back to Rhodian and Roman maritime law, *see* M. Norris, 3A *Benedict on Admiralty: The Law of Salvage* § 1, at 4-7 (1958 & Supp. 1974), the modern development of the law and refinement of maritime technology in the post-World War II era. We are thus at the crossroads requiring the Court's attention to this case.

Upon a finding of abandonment, the maritime law of finds acts to protect the totality of interests in historic shipwrecks. The law of finds maintains the integrity of shipwrecks, with title in a single owner, and, further, requires those who recover long-lost items, to preserve their discoveries in a manner so as to maximize the historical and scientific value of the recovery. *Columbus-America Discovery Group v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 1989 A.M.C. 1955, 1958 (E.D.

Va. 1989). Conversely, the law of commercial salvage imposes no such duty,[1] and encourages salvors and other claimants to carve shipwrecks up into sections owned by a number of different interests, thereby destroying all of the irreplaceable information that can be gleaned from studying shipwrecks as a unified whole. *See* Nicholas J.J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990*, 16 Tul. Mar. L.J. 1 (1992).

Thus, the determination of when a shipwreck is abandoned affects both preservation under the Abandoned Shipwreck Act and whether the commercial law of salvage or the law of finds will apply to long-lost shipwrecks; and these issues, in turn, are especially important in the context of historic preservation. If, as the Fourth Circuit held, abandonment cannot be inferred as a fact from circumstantial evidence (including, as here, the passage of approximately 130 years during which the insurance claimants did nothing but destroy any documents evidencing an interest), we risk losing forever a window into the past and the opportunity to study and share our rich cultural heritage. Much of this information is irreplaceable, and now could be lost to all generations to come. Accordingly, the issue affects literally millions of Americans, living and unborn, and warrants the Court's attention.

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[1] While the Fourth Circuit suggested that the law of salvage should be changed to entitle salvors to a larger salvage award for preserving "the historical and archaeological value of the wreck and the items salved," *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 468 (1992), it imposed no duty on salvors to take such steps. Instead, it created an incentive for finders to conceal their finds, much as grave robbers did to ancient Egyptian pyramids, because it makes it virtually impossible for them to acquire legitimate control over their discoveries.

III. ADMIRALTY COURTS SHOULD BE PERMITTED TO CONTINUE TO INFER ABANDONMENT OF LONG-LOST SHIPWRECKS BASED ON CIRCUMSTANTIAL EVIDENCE

There are overwhelming policy reasons for allowing admiralty courts to continue to infer abandonment based on circumstantial evidence. For example, application of the law of finds achieves certainty and predictability of legal rights. As time passes, memories fade, claims become stale, witnesses are lost, and the chances of mistake, or even fraud, become great. The corresponding need for repose increases. Expending resources in litigation over title, when such resources could be better spent on historic preservation and scientific study, is wasteful and will burden our court system and historical preservation efforts for years to come.

Equally important, the new rule established by the decision below will encourage concealment, and perhaps outright destruction, of historical information by finders of long-lost shipwrecks. Yet, on the contrary, the law should encourage investigation and preservation of information about historic shipwrecks, consistent with our national policy. Those who find shipwrecks should have every incentive to act openly, and to strive to determine as much as possible about the shipwrecks. The Fourth Circuit's opinion provides precisely the opposite incentive. By according a presumption of ageless vitality to ownership interests, the decision below discourages finders from investigating conditions, items, and structures at wreck sites that may link a particular recovered artifact with a specific long-gone crew member, cargo interest, or passenger. In effect, the finder has a disincentive to develop historical information that might shed valuable light into the provenance and history of the shipwreck.

CONCLUSION

For these reasons, as well as those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE OHIO ACADEMY OF SCIENCE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE OHIO ACADEMY OF SCIENCE IN SUPPORT OF PETITIONER

The Ohio Academy of Science hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

Founded in 1891, The Ohio Academy of Science is a non-profit organization interested in science and technology. The Academy embraces all scientific disciplines, encouraging the discovery, dissemination and practices of science, mathematics and engineering. Among the Academy's objectives are to stimulate interest in the sciences, to promote research, to improve instruction in the sciences, and to recognize high achievements in attaining these objectives.

The Academy promotes cooperation between academic and industrial scientists, provides youth science opportunities through a Junior Academy program and presents scholarly papers. The Academy is vitally concerned about the need to maintain and improve the climate for curiosity, discovery and innovation.

The repose, certainty and predictability of the maritime law of finds have been effectively destroyed by the Fourth Circuit's opinion. Yet, it was that repose, certainty and predictability that allowed the chemists, biologists, oceanographers and historians working on the *S.S. Central America* Project to discover an extraordinary deep-sea community of life forms, to recover a lost part of America's heritage, to advance scientific progress, and to provide educational programs in museums across the country.

Scientific research is limited only by the imaginations of the scientists who are afforded the opportunity to participate in such ventures, and thus turns on the ability of such ventures to attract private venture capital. By creating uncertainty as to the ownership of long-lost shipwrecks, the decision below will render it difficult, if not virtually impossible, to attract the private funding needed for scientific exploration and discovery in remote areas, such as the deep seas.

If the Fourth Circuit's decision is allowed to stand, the result may well be that scientists and engineers who dare to dream, and whose vision, hard work and ingenuity make their dreams a reality, will be tied up in costly and protracted litigation over dozens of stale claims. Such scientists and engineers should be acquiring knowledge and, thus, producing benefits for all by investigating new frontiers, such as the deep ocean, rather than being held hostage in the nation's courthouses.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1189

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et. al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE OHIO ACADEMY OF SCIENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

Founded in 1891, The Ohio Academy of Science is a non-profit organization of those interested in science and technology, whose mission is to empower curiosity, discovery and innovation by stimulating interest in the sciences, engineering and technology; by promoting and supporting research; by improving science education; by disseminating scientific knowledge; and by recognizing and publicizing high achievement in attaining these objectives. The Academy embraces all scientific disciplines, encouraging the discovery, dissemination and practices of science, mathematics and engineering. Its efforts extend to the public and private schools, the universities and colleges, museums, mines, farms, factories and service establishments of Ohio. The Academy promotes cooperation between academic and industrial scientists, provides youth science opportunities through the Junior Academy program, presents scholarly

papers, publishes and distributes *The Ohio Journal of Science*, bestows public recognition of excellence in education and research, and provides advice to public policy makers.

Significant legal and social change has occurred in our nation since the Academy's beginnings in 1891. But one thing has remained constant: the need to maintain and improve the climate for curiosity, discovery and innovation. Because of its enduring concern with this need, and because the Academy is deeply distressed over the chilling effect of the court of appeals' opinion on scientific investigation of the deep sea, The Ohio Academy of Science urges the Court to review the decision below.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE COURT SHOULD GRANT REVIEW BECAUSE OF THE IMPORTANT QUESTION OF ADMIRALTY AND MARITIME LAW PRESENTED THAT, IF LEFT UNRESOLVED, WILL FORECLOSE OPPORTUNITIES FOR SCIENTISTS TO ATTRACT PRIVATE VENTURE CAPITAL IN THEIR STUDIES OF THE DEEP SEAS, AND THEREBY HAMPER RESEARCH AND DEVELOPMENT IN A BROAD ARRAY OF SCIENTIFIC DISCIPLINES

A. The Seas and Their Myriad of Resources Offer Great Potential for Stimulating Advances in Human Knowledge and Responsible Enjoyment of Marine Environments

As the last frontier on earth, the deep seas may help shape the future of mankind. The world's oceans cover more than two-thirds of the planet. Their vast, untapped resources—biological, medical, and chemical—remain largely unexplored.

Early in the 1980s, more than 125 years after the *S.S. Central America* disaster, a small group of engineers and scientists in Columbus, Ohio teamed together to explore

the deep-sea frontier. As their vision of locating and recovering the wreck of the *S.S. Central America* progressed, it grew to include an international network of scientists interested in the program. Charles E. Herdendorf, *Discovery in an Alien Environment,* American History Illustrated, Mar.-Apr. 1991, at 66.

Even before these diverse scientific investigations were under way, science and the scientific method were playing a critical role in the *S.S. Central America* Project, as navigational records and accounts of some sixty survivors and witnesses were investigated and analyzed to compile a data matrix, cataloging events and conditions at three-hour intervals during the voyage's final thirty hours. A specialist in modern search theory mathematics then used this data to develop a reasonably well-defined search area. With the help of computer models and meteorological and oceanographic data, he determined the probable effects of the hurricane winds and ocean currents upon the stricken vessel under a series of possible scenarios. The resulting "probability maps" suggested that the wreck lay within a fourteen-hundred-square-mile area of sea floor on the Blake Ridge. *Id.* A wide-swath, side-scanning sonar system was then used to finally determine the location of the shipwreck.

Once the shipwreck was found, science and the scientific method again played crucial roles, as the submersible designed, engineered and built by Columbus-America Discovery Group, *Nemo,* transmitted three-dimensional images to scientific researchers on the surface vessel, thus providing "telepresence" and excellent underwater depth perception. *Nemo's* five camera booms also provided multiple perspectives for recording the deep-sea investigation. *Id. Nemo's* robotic arms and tactile manipulators are powerful enough to handle and recover massive objects, "yet sensitive and precise enough to retrive gold coins smaller than a dime." *Nemo* uses a hydraulic "dustpan" and water-jet system to recover particularly delicate arti-

facts. The relative locations of loosely grouped objects are preserved, as *Nemo* utilizes an injector system that encases the materials in a fast-hardening silicon fluid. *Id.*

Because long-lost and abandoned shipwrecks like the *S.S. Central America* are a biological oasis on the ocean floor, exploring them affords a unique opportunity for scientific study of marine life and the deep-sea environment. Over the years, a multitude of minute shells have rained down upon such vessels from the ocean's surface. These shells form an oasis among the wooded timbers, coal, and metalworks that have been colonized by a diverse group of deep-sea animals such as amphipods, barnacles, feather and serpent stars, galatheid crabs, glass sponges, gorgonian coral, polychaete worms, pholadid clams, sea anemone, sea cucumbers, and several species of deep-sea fishes. These creatures are often unexpectedly brilliant in color—pink and gold coral, vermilion starfish, orange and yellow anemone, purple sea cucumbers, red shrimp, and stark white crinoids—and are always stunning in their diversity and potential in scientific study. *Id.*

B. In Addition to Opportunities for Scientific Research, Exploration of Long-lost Items on the Seafloor Provides the Foundation for Scientific Breakthroughs in Medicine, Food Production, Energy and Education

Although the opportunities presented by shipwrecks for pure scientific research and development are legion, deep ocean shipwrecks provide enormous potential for significant practical applications. The potential practical applications of such scientific research are limited only by the opportunities afforded scientists to participate in such efforts, and thus turn on the ability of these endeavors to attract private venture capital. *See id.* at 71.

The *S.S. Central America* Project has unveiled practical applications in an array of fields. For instance, food

chain analysis performed as part of the shipwreck study presents substantial opportunities for better understanding of the food chain, and may help expand available food supplies, both plant and animal.

The *S.S. Central America* Project also promises to lead to significant breakthroughs in medicine. As the supply of new strains of viruses and simple terrestial organisms continues to diminish, deep-sea organisms will be needed in developing new types of vaccinations and medicines. Newly found forms of deep-sea marine life have already shown great potential to serve anti-viral, anti-fungal, anti-tumor, anti-inflammatory, and immunomological purposes. Without the type of innovative deep ocean discovery (and the corresponding developments in marine technology and methods of scientific investigation in the oceans) conducted by ventures such as the *S.S. Central America* Project, it will be difficult to obtain the supplies of organisms desparately needed by the medical community. The discovery of 11 new species of marine life by the Project, some of which present substantial promise in pharmacological and medical applications, is illustrative of the opportunities presented by ocean research and development.

C. Scientific Research in the Deep Seas Is Enormously Expensive and Risky, and the Protracted and Costly Title Litigation Sanctioned by the Decision Below Will Hamper the Ability of Scientists to Attract Badly Needed Funding

The very undertaking of deep-ocean research is fraught with risk. Failure can literally occur at any stage of the discovery and recovery processes. The costs associated with the development of innovative marine technologies needed for deep-sea discovery are tremendous. Such endeavors rely almost exclusively on sophisticated and costly specialized technologies. *See* U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation—Background Paper*, OTA-BP-E-

37, 8 (1987). *See generally* Drew F. T. Horrell, Note, *Telepossession is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery*, 3 Pace Y.B. Int'l L. 309 (1991) [hereinafter, Horrell, *Telepossession*] (describing these technologies).

The risk and cost inherent in deep-sea research is now compounded by the decision below. That decision invites speculative and even fraudulent claims, thus ensuring burdensome and extremely costly litigation, and rendering it nearly impossible to attract the private funding and enterprising explorers required to explore and conduct research in remote environments. In the past, the incentives provided by the certainty and predicability of title to items long-lost at sea—which vested in the discoverer under the prevailing law of finds—helped attract funding for such risky ventures. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (law of finds applies when "articles have been presumptively abandoned, *i.e.* either affirmatively renounced, or *so long lost that time can be presumed to have eroded any realistic claim of original title . . . .*") (emphasis added); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982).

The conflict in the applicable law, and in particular the decision below, make it extremely difficult, if not impossible, to quiet title to cultural deposits in the deep ocean without costly and burdensome litigation, and thus, it jeopardizes the future of deep-sea research. *See* Anne G. Giesecke, *To Be or Not To Be Abandoned*, Sea Technology, Jan. 1993, at 93. It will be difficult, if not impossible, to attract and maintain the private venture capital required for deep-sea science. *See* 30 U.S.C. § 1401(a)(13) (finding that the uncertainty of the applicable legal regime discourages private investment in deep-sea discovery).

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATE SUPREME COURTS IN THE APPLICATION OF MARITIME LAW THAT BURDENS SCIENTIFIC INVESTIGATION OF DEEP-OCEAN SHIPWRECKS AND IMPAIRS THE ABILITY OF SCIENTISTS TO PARTICIPATE IN DEEP-OCEAN PROJECTS

A. As Noted By the Dissenting Opinion Below, the Court of Appeals' Decision Is in Conflict With the Principles of Federal Maritime Law Applied by Other Circuits and by State Courts

Under the Fourth Circuit's opinion, no factual showing of abandonment based on circumstantial evidence can ever be made. Thus, under the court of appeals' new test, no abandonment can be found absent an express declaration renouncing title. Because of the passage of time and other factors, there is rarely, if ever, any evidence that the former owner of a long-lost shipwreck affirmatively renounced all rights to the shipwreck's cargo. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 472 (4th Cir. 1992) (Widener, J., dissenting). Accordingly, it will be nearly impossible for finders to carry the onerous burden of proof imposed on them by the Fourth Circuit. The new test in the opinion allows claims of ownership, scores of years old, to cloud title to property found at sea, hampering freedom of scientific investigation and exploration of the deep seas in contravention of U.S. policy and jurisprudence. *See* 30 U.S.C. § 1401(a)(12); 30 U.S.C. § 1402(a) (asserting the U.S. policy of maintaining the freedom to explore and recover the resources of the deep sea).

By according a presumption of ageless vitality to purported ownership interests in long-lost shipwrecks, the Fourth Circuit's opinion undermines the certainty and predictability heretofore accorded explorers who have found, taken into possession, and conserved long-lost items on the seabed. The court of appeals' virtual assurance

that the maritime law of finds will not apply whenever a claim is asserted by a purported successor in interest to an original owner thus extends a blanket invitation to highly speculative and fraudulent claims. The repose, certainty and predictability of maritime law of finds, have been effectively destroyed by the Fourth Circuit's opinion.[1] Yet, it was that repose, certainty and predictability that had allowed the chemists, biologists, oceanographers and historians working on the *S.S. Central America* Project to discover the extraordinary deep-sea community of life forms, to recover a lost part of America's heritage, to advance scientific progress, and to provide educational programs in museums across the country.

B. By Improperly Shifting an Impractical Legal Standard and an Unrealistic Burden of Proof Onto Discoverers, the Court of Appeals' Decision Penalizes and Discourages Scientific Inquiry Into Information That Might Identify Potential Claimants

The court of appeals' decision means that scientists who discover information linking particular artifacts to former

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[1] In applying the law of finds, admiralty courts have determined that, as a threshold, the finder must act in good faith to protect the scientific, historic and archaeological values of the shipwreck. By contrast, a court has no power to impose such a requirement on a claimant alleging original ownership (or a claim of subrogation). The alleged owner, acting either directly or through contract salvage, may do whatever it desires with its property, without regard to the destruction of the scientific and historic information. Indeed, insurers typically handle salvage on a "no cure, no pay" basis; salvors are compensated solely for salvaging the insurers' alleged property—not for protecting others' interests. Therefore, the application of the law of salvage not only flies in the face of established maritime law, but it threatens to destroy the scientific and historical value of shipwreck sites. Contract salvage used by the Fourth Circuit places no duty on the finder or salvor to protect the scientific, *or* historic, *or* archaeological values of the shipwreck site or its artifacts. *See* Nicholas J. J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form Salvage Agreement*, 16 Tul. Mar. L.J. 1 (1992). *See also* Horrell, *Telepossession*.

owners hundreds of years in the past may face literally dozens and dozens of lawsuits. The opinion openly invites handfuls of those who appear generations after a vessel has been lost and forgotten by history to file claims of ownership, whether as descendents of passengers who sailed aboard the ship, heirs of captains and crew members, or insurance companies claiming by subrogation. *Columbus-America Discovery Group*, 974 F.2d 450.

The result is that scientists and engineers like those in Columbus-America Discovery Group, who dare to dream, and whose vision, hard work and ingenuity make their dream a reality, are tied up in costly and protracted litigation over dozens of stale claims. Such costly and protracted litigation sanctioned by the decision below will burden not only the scientists who make finds but also the admiralty courts, which are faced with "the Herculean task" of adjudicating rights in items lost for hundreds of years. *Id.* at 475 n.7. Such scientists and engineers should be acquiring knowledge and producing benefits for all by investigating the new frontiers of the deep ocean, not being held hostage in the nation's courthouses. And society should enjoy the benefits of their efforts and hard work.

The decision below creates a conflict with not only the other circuits that have considered the standards for determining abandonment of long-lost property on the seabed, but also the state courts. As the dissent notes, the decision below is in conflict with the principle that "[a]bandonment may be inferred from all of the relevant facts and circumstances and may be determined on the basis of circumstantial evidence." *Id.* at 472. Under the principle of *animus revertendi*, abandonment may be inferred based on the conduct of the claimant to ownership, and "A formal declaration is not necessary; abandonment may be inferred from acts and conduct of an owner clearly inconsistent with an intention to return to the property, and from the nature and situation of the property." *See Hatteras, Inc. v. The U.S.S. Hatteras*, 1984 A.M.C. 1094, 1097 n.5 (S.D.N.Y. 1981).

The issue is thus important and unsettled—and in desperate need of resolution by the Court. "How the law of finds will turn out in cases on the high seas will need resolution by the Supreme Court. What proof is needed to show abandonment?" Paul S. Edelman, *Who Gets Treasure Recovered From Sea?* N.Y. L.J., Dec. 4, 1992, at 3, 4.

Worse yet, due to the conflict among the circuits, scientists are faced with the intolerable dilemma of having their research impeded by the thought that if they conduct scientific inquiry that may link particular artifacts to potential claimants, they may be subjecting themselves and their work to intensive litigation, and that if they do not, they may be forever losing the opportunity to discover valuable and important scientific and historic information. See William J. Broad, *Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. Times, Feb. 2, 1993, at B6 (Fourth Circuit's decision will encourage secretiveness and discourage the dissemination of information, about deep-sea wrecks).

If the Fourth Circuit's decision is allowed to stand—and those who do nothing are bestowed a windfall from the risk and hard work of others—we will all be the losers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE OHIO HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE OHIO HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

The Ohio Historical Society hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae.* Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The Ohio Historical Society was founded in 1885 by Ohioans interested in preserving their heritage and is now one of the largest state historical societies in the country. The Society is a repository of more than two

million historical artifacts from Ohio, and is dedicated to interpreting, collecting, and preserving the state's heritage. Bordered by Lake Erie on the north and the Ohio River on the south, Ohio has a rich maritime history, and the Ohio Historical Society is charged with preserving that history.

The Ohio Historical Society believes that the outcome of this case will determine ownership rights of many long-lost artifacts, such as shipwrecks, for years to come. Long-lost shipwrecks provide us with a wealth of historical information. For instance, a great deal can be learned about trade practices from merchant ships; about warfare from warships; and about specialized professions, such as fishing, from ships designed for specific functions. There is also a wealth of technical information embodied in the remains of ships, such as evidence of design and construction that is often revealed by toolmarks on the timbers and other markings. Moreover, much of the "economy, society, and culture" of seafaring communities is reflected in the contents of ships. Keith Muckelroy, *Maritime Archaeology* 101 (1978).

If, as the Fourth Circuit held in this case, the law of salvage is to be preferred in cases of long-lost shipwrecks, we will lose forever a window into the past and the opportunity to study and share our rich cultural heritage. A long-lost shipwreck is far more than just a collection of rotted wood, rusted metal, and artifacts on the ocean floor; each shipwreck is a unique repository of our history and cultural heritage. The Ohio Historical Society is deeply concerned about the devastating impact the decision below will have on the preservation of historical material and information.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, nonuse, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE OHIO HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Founded in 1885 by Ohioans interested in preserving their heritage, The Ohio Historical Society is now one of the largest state historical societies in the country. The Ohio Historical Society is a repository of more than two million historical artifacts from Ohio, and is dedicated to interpreting, collecting, and preserving the state's heritage. In addition, The Ohio Historical Society offers a broad range of activities designed to educate the public

about the history and archaeology of Ohio and the valuable lessons that we all can learn from the past. Bordered by Lake Erie on the north and the Ohio River on the south, Ohio has a rich maritime history, and The Ohio Historical Society is charged with preserving that history.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE ISSUE OF WHAT CONSTITUTES ABANDONMENT IS OF PARAMOUNT IMPORTANCE TO THE FUTURE OF HISTORIC PRESERVATION IN THIS COUNTRY

The issue of when long-lost shipwrecks are effectively abondoned is one of first impression before this Court. Although the question of what rights accrue to a finder or salvor upon locating a shipwreck can be traced back to Rhodian and Roman maritime law, *see* M. Norris, *The Law of Salvage* 1, 4-7 (1958 & Supp. 1974), the development of the law in this area has lagged behind the development and refinement of marine technology in the post-World War II era. We are thus at a crossroads requiring this Court's attention to this case.

Upon a finding of abandonment, the maritime law of finds protects the totality of interests in historic shipwrecks. This is true largely because the law of finds requires those who recover long-lost items to preserve their findings in a manner so as to maximize the historical and scientific value of the recovery. *Columbus-America Discovery Group, Inc. v. Unidentified and Abandoned Sailing Vessel*, 1989 AMC 1955, 1958 (E.D. Va. 1989). Conversely, the law of salvage imposes no such duty. In fact, the law of salvage encourages salvors and other claimants to carve shipwrecks into sections, thereby destroying all of the irreplaceable information that can be gleaned from the wrecks as a whole. *See* Nancy Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form Salvage Agreement*, 16 Tul. Mar. L.J. 1 (1992).

Thus, whether the law of salvage or the law of finds will apply to long-lost shipwrecks is especially important in the context of historical preservation. If, as the Fourth Circuit held in this case, the law of salvage is to be preferred in cases of long-lost shipwrecks, we will lose forever a window into the past and the opportunity to study and share our rich cultural heritage. The outcome of this case will determine ownership rights of many long-lost artifacts for years to come.

II. MUCH OF OUR CULTURAL HERITAGE MAY BE UNCOVERED ONLY THROUGH MARITIME CONSERVATION AND PRESERVATION EFFORTS

An abundant amount of the material evidence of our past now lies underwater. In fact, the remains of dwellings and even primitive boats, as well as rudimentary implements and utensils, have often been preserved in remarkable condition in the mud or silt of rivers and lakes. Additionally, vestiges of harbors and even whole cities that have succumbed to sea level changes or catastrophes now lie beneath the seas. Because boats and ships, one of the first means of viable, efficient transportation, have carried passengers and cargoes across estuarine and coastal waters and the open seas for thousands of years, the remains of many voyages have likewise been preserved within the seabed. *See generally* Colin Martin, *Archaeology in an Underwater Environment, in Protection of the Underwater Heritage* 14 (1981) [hereinafter Martin, *Archaeology*].

A. Long-Lost And Abandoned Shipwrecks Provide A Rare Opportunity To Peer Through A Window Of Time

Long-lost shipwrecks provide us with a wealth of historical information. For instance, a great deal can be learned about trade practices from merchant ships; about warfare from warships; and about specialized professions, such as fishing, from ships designed for specific functions.

This information in turn is evidence of the achievements and aspirations of those who constructed the ships and the societies in which they lived.

It is only with the occurrence of a "shipwreck that the whole unit—ship, cargo, and shipboard community—is deposited on the seafloor, creating a material record that is archaeologically recoverable. . . ." *Id.* at 75. That material record is primary evidence of our cultural heritage.

1. *Shipwrecks Are Storehouses Of Valuable Historical Information About Shipboard Life And Seafaring Societies*

The crew of a ship, particularly a sea-going one, is a self-contained society, in many respects representing a microcosm of the community left ashore. Much of the "economy, society, and culture" of seafaring communities is reflected in the contents of ships. Keith Muckelroy, *Maritime Archaeology* 101 (1978) [hereinafter Muckelroy, *Maritime Archaeology*]. Such contents help reconstruct life in the past by providing what is in a literal sense a "time capsule of the varied objects in general use at a given period." *See* Martin, *Archaeology* at 21.

Thus, shipwrecks are "storehouses of materials and information on the shipboard life of time." Kenneth Cassavoy, *The HAMILTON and The SCOURGE: A First Look, in Nautical Archaeology* 176, 187 (Susan M. B. Langley & Richard W. Unger eds., 1984) [hereinafter Cassavoy, *Nautical Archaeology*]. Moreover, "the fact that all the objects which sink with a ship were in use up to the moment of disaster (though some, of course, may have been older than others when they were lost) gives such a collection yet further archaeological value." Martin, *Archaeology*, at 21. The wealth of historical information that properly excavated and preserved shipwrecks can contain is tremendous:

> As cultural resources [shipwrecks] provide valuable information about the historic changes in vessels and

> also about changes in warfare and commerce. About their place in history, moreover, we learn not only from their cargoes, but also from their utensils and other artifacts of daily life they carried and that sank with them: plates, glassware, cutlery and clothing, for example. As such they can be understood as potential museums of temporal context, preserving a collection of items and also a narrative segment of history which their routes, logs, and wreckage present to the archaeologist as a unique challenge to preserve. In some cases, they may provide extremely rare evidence. . . .

Anne Giesecke, *Shipwrecks: The Past in the Present*, 15 Coastal Mgmt. 179, 180-81 (1987).

The fact that shipwrecks can take us on a journey back through time is perhaps best illustrated by the *S.S. Central America*, which has given us a rare glimpse into daily life in pre-Civil War America. The *S.S. Central America* settled almost two miles down onto a plain with extremely low temperatures and very little turbulence. Because of these favorable conditions, the *S.S. Central America* has been preserved in remarkable condition and thus offers unique insight into the past.

Columbus-America Discovery Group has already retrieved numerous links to our past from both the ship and her cabins and stores. The vast array of artifacts that has been recovered include the ship's bronze bell marked "Morgan Iron Works—New York—1853," whiskey bottles, a porcelain wash basin and the lid from a container of "Roussel's Unrivaled Premium Shaving Cream." Charles Herdendorf, *Discovery in an Alien Environment*, American History Illustrated, Mar.-Apr. 1991, at 66, 71. Some of these artifacts were found in passengers' trunks, which also revealed clothing ranging from men's shirts and trousers to undergarments and bodices. The clothing has been "a very significant vehicle for understanding the daily lives of people. It represents the choices and decisions made by people, and as such

it is a key to the behaviors of the past." Tim Noonan, *History Under the Sea*, American History Illustrated, July-Aug. 1992, at 59, 62.

Aside from the *S.S. Central America*, the wreck of the *Trinidad Valencera* is a prime example of the sort of historical information that even a single ship can yield. The *Trinidad* was part of the Spanish Armada, and its cargo was part of a siege train to be used by the invading army once it had landed in England. The *Trinidad's* cargo included the dismantled parts of gun-carriages such as wheels, axles and limbers, numerous small supply items including scaling poles, water flasks and a keg of gun powder. But, the most spectacular find of all was five bronze cannons. The cargo recovered from the *Trinidad* "has highlighted an aspect of the Armada which is often overlooked, its role as a supply squadron." Muckelroy, *Maritime Archaeology*, at 101.

The contents of the *Trinidad* also revealed information about life during the sixteenth-century:

> The *Trinidad Valencera* site also illustrated the significance of these wrecks as a cross-section of late sixteenth-century society. Her Venetian origins were betrayed not only by the Venetian cannon found on board . . . but also by sherds of characteristic brightly painted Venetian earthenware. More surprisingly, a few pieces of Chinese porcelain were also found, reflecting the amenities enjoyed by the superior officers. The range of ordinary Spanish wares from this site was also of interest, since some items, notably the olive jars and plates from Seville, were apparently derived from the ship's first mustering at Cadiz, while other pottery types represented stores taken on at the final assembly point at Lisbon.

Id.

There is also a wealth of technical information embodied in the remains of ships, such as evidence of design and construction that is often revealed by toolmarks

on the timbers and other markings. Information about the ancillary fittings of ships can also be gleaned from the remains of their propulsion, rigging and steering arrangements, anchors and equipment connected with the maintenance and running of the vessels. Piecing this information together helps us understand ships in their original form, as complex and highly organized technical machines.

B. Long-Lost Shipwrecks Afford Us The Opportunity To Check Historical Accounts Against History Itself

Long-lost shipwrecks also give us "the rare opportunity to check historical accounts against history itself." Cassavoy, *Nautical Archaeology*, at 187. In some instances, historical accounts accepted for decades or even centuries are belied by information gathered from shipwrecks. For example, in one historical account of the sinking of the *Scourge*, as narrated by passenger Ned Myers to James Fenimore Cooper, Myers noted that "[t]he starboard second gun, from forward, had capsized and come down directly over the forward hatch, and I caught a glimpse of a man struggling to get past [it] . . . ." *Id.* at 187 (quoting James F. Cooper, *Ned Myers, or a Life Before The Mast* (1843)). The photographic evidence of the wreck of the *Scourge*, however, tells a somewhat different story. From the photographs, it can clearly be seen that none of the guns capsized back on the deck. All of the cannons were, in fact, still in their respective ports. Although the account recorded by Cooper was often regarded as the definitive source of information both on the details of the ship itself, and as a fully factual account of the sinking of the *Scourge*, it is no longer viewed as dispositive.

The very existence of certain artifacts in long-lost shipwrecks also assists us in better understanding events that happened before the dawn of recorded history. For instance, the archaeological evidence of pottery found aboard a small Greek trading vessel indicated that, con-

trary to widely accepted notions, Phoenicians from Syria played an important part in the sea trade of the time. This was an extremely important discovery because,

> one of the reasons for giving a late date to the writing of Homer's *Odyssey* has been the frequent mention in it of the activity of Phoenician merchants. Now that we know this Phoenician trading was going on by the twelfth century BC, we may have to revise our ideas about when Homer lived and wrote. A few scraps from the sea-bed can influence literary history as well.

Paul Johnstone, *The Archaeology of Ships* 25-26 (1974).

III. THERE ARE OVERWHELMING POLICY REASONS MILITATING IN FAVOR OF APPLYING THE LAW OF FINDS TO LONG-LOST SHIPWRECKS AND OTHER ARTIFACTS

There are overwhelming policy reasons for applying the maritime law of finds to long-lost shipwrecks. Application of the law of finds achieves certainty and predictability in legal rights. As time passes, memories fade, claims become stale, witnesses are lost and the chances of mistake, or even fraud, become great. The corresponding need for repose increases. Proof of ownership and property rights in a free society cannot be based on sheer speculation or unknown contingencies. Expending resources in litigation over title, when such resources could be better spent on historic preservation and scientific study, is wasteful and will burden our court system for years to come.

A. The Fourth Circuit's Opinion Encourages Finders Of Shipwrecks To Conceal Their Discoveries

The law should encourage investigation and preservation of information about historic shipwrecks. Thus, those who find shipwrecks should have every incentive to act openly, and to strive to determine as much as possible about the shipwrecks. Yet, somewhat ironically, the

Fourth Circuit's opinion provides precisely the opposite incentive. By according a presumption of enduring vitality to ownership interests, the decision below actually discourages finders from investigating conditions, items and structures at the wreck site that may link a particular recovered artifact with a specific crew member, cargo owner, or passenger. In effect, the finder has a disincentive to develop historical information that might shed valuable light on our past.

CONCLUSION

A long-lost shipwreck is far more than just a collection of rotted wood, rusted metal and artifacts on the ocean floor; each shipwreck is a unique repository of our history and cultural heritage. Thus, the true treasure of the *S.S. Central America* is not only its gold, but also the bounty of historical, archaeological, and cultural data that may be collected using sophisticated conservation techniques. The Fourth Circuit's decision, granting a virtually irrebuttable presumption that the law of salvage applies to long-lost property, threatens our ability to gather and preserve the historical information revealed by shipwrecks. If the Fourth Circuit's opinion is allowed to stand, we will be deprived of further links to our past.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE OHIO STATE UNIVERSITY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE OHIO STATE UNIVERSITY IN SUPPORT OF PETITIONER

The Ohio State University hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae.* Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The Ohio State University is a public institution of higher learning whose main campus is in Columbus, Ohio. The University has 4,461 faculty members and approxi-

mately 58,585 students in its various colleges and graduate schools. Since its founding in 1870, The Ohio State University has sought to encourage learning, research, and the dissemination of knowledge in virtually all fields of study, including social science, physical science, liberal arts, the professions, business, and finance.

Shipwrecks offer opportunities for research in many of these fields of study. The breadth of those opportunities is easily illustrated by the work associated with the discovery, recovery, and conservation of the *S.S. Central America*. The academic research programs at The Ohio State University have directly benefited from the access to the deep seas that has been provided by the privately funded efforts of Columbus-America Discovery Group. The continuation of these research efforts may well turn on whether the court of appeals' decision is allowed to stand.

The Ohio State University is concerned that the court of appeals' decision will discourage privately funded deep-sea exploration by ensuring that those who recover long-lost shipwrecks will face costly, protracted litigation with insurance companies and underwriters, among others, seeking to share in the fruits of their labors. More importantly, The Ohio State University is concerned that the effect of the court of appeals' decision will be to encourage less scrupulous explorers to secretly plunder shipwrecks and abscond with their treasures.

The Ohio State University is also vitally concerned that under the court of appeals' decision, private discoverers will be less inclined to devote the necessary labor, resources and time to preserving shipwreck sites for research. Thus, if the decision below is allowed to stand, the historic, scientific and cultural values of such shipwrecks could be forever lost to all of us and universities will lose the unique opportunity to undertake educational and scientific endeavors, such as those performed in conjunction with the *S.S. Central America* Project.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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February 1993

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE OHIO STATE UNIVERSITY IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Ohio State University is a public institution of higher learning whose main campus is in Columbus, Ohio. It has 4,461 faculty members and approximately 58,585 students in its various colleges and graduate schools. Since its founding in 1870, The Ohio State University has sought to encourage learning, research, and the dissemination of knowledge in virtually all fields of study, including social science, physical science, liberal arts, the professions, business, and finance.

The academic research programs at The Ohio State University, like the research programs at many other colleges and universities across the country, have directly benefited from the access to the deep seas that has

been provided by the privately funded exploratory efforts of the Columbus-America Discovery Group. The Ohio State University therefore respectfully requests that the Court grant the petition for certiorari in this case for two reasons.

First, The Ohio State University is concerned that the court of appeals' decision will discourage privately funded deep-sea exploration by ensuring that those who recover long-lost shipwrecks will face costly, protracted litigation with insurance companies and underwriters seeking to share in the fruits of their labors. Second, and perhaps more importantly, The Ohio State University is concerned that the court of appeals' decision will encourage less scrupulous explorers to secretly plunder shipwrecks and abscond with their treasures in an attempt to avoid those that, under the lax rule applied by the Fourth Circuit, would inevitably seek to share in the fruits of someone else's labors. The historic, scientific and cultural values of such shipwrecks could be forever lost to mankind.

In contrast to the Fourth Circuit's opinion, the trial court's decision provides stability and needed assurance to deep-sea explorers that their efforts, if successful and carried out responsibly, will be fully rewarded financially. Of greater importance, the trial court's decision encourages participation in deep-sea exploration by a broad spectrum of groups, including those that see shipwrecks not only as sources of material wealth, but also as storehouses of scientific and archaeological information to be shared, with benefits to all.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE ISSUE PRESENTED IN THIS CASE VITALLY AFFECTS MANY EDUCATIONAL CONCERNS IMPACTING INSTITUTIONS OF HIGHER LEARNING ACROSS THE NATION

A. Long-Lost and Abandoned Shipwrecks Offer Enormous Opportunities for Research in Many Fields of Study

The breadth of opportunities for research offered by long-lost and abandoned shipwrecks is exemplified by the work associated with the discovery, recovery, and conservation of the *S.S. Central America*. Many of the academic departments of The Ohio State University, including students and faculty, have taken advantage of the shipwreck project to conduct invaluable research. The ability and willingness of Columbus-America Discovery Group to permit that research by the university stemmed from the Group's unencumbered rights in the shipwreck—rights that have now been brought into question by the court of appeals' decision.

The professors and departments at The Ohio State University that have been involved with the *S.S. Central America* project are as numerous as they are diverse. They include:

Professor	*Department*	*Studies*
Dr. Keith Bedford	Civil Engineering	ocean & sediment dynamics
Dr. John M. Cassady	College of Pharmacy	pharmacological screening of sponge
Dr. Charles F. Cole	Natural Resources	deep-sea fishes, fisheries
Dr. George Disterdick	Veterinary Hospital	x-ray analysis of wood from shipwreck
Dr. Rosanne Fortner	Natural Resources & Science Education	marine education

Professor	*Department*	*Studies*
Dr. David K. Ho	College of Pharmacy	pharmacological screening of sponge tissue
Dr. Kathryn A. Jakes	Textiles & Clothing	textile preservation
Dr. Lawrence Krissek	Geological Sciences	deep-sea sediments
Dr. Glyn Meyrick	Material Science and Engineering	metals analysis
Dr. Robert Pfister	Microbiology	marine microbiology
Dr. Jeffrey M. Reutter	Sea Grant & Zoology	marine education
Dr. Susan Smialowska	Metallurgical Engineering	metal corrosion
Dr. George R. St. Pierre	Material Science and Engineering	iron corrosion
Dr. David H. Stansbery	Zoology & Museum of Biodiversity	deep-sea mollusks
Dr. Ronald L. Stuckey	Plant Science	aquatic plants, biogeography
Dr. Thomas Waters	Zoology & Museum of Biodiversity	deep-sea mollusks

The continuation of these research efforts may well depend upon whether the court of appeals' decision is left to stand. The Ohio State University respectfully urges the Court to grant the petition for certiorari, so that institutions of higher learning will continue to have access to the research opportunities that existed prior to the Fourth Circuit's opinion. President of The Ohio State University, E. Gordon Gee, succinctly stated the importance of deep-ocean shipwrecks to institutions of higher learning in a letter to the Fourth Circuit urging reconsideration of its decision:

> Academic research programs at The Ohio State University and other institutions are benefiting from access to the deep ocean provided by the privately funded efforts of Columbus-America Discovery Group, Inc. Because of the immense opportunity to add to our storehouse of knowledge through continued pri-

> vate exploration of the deep ocean, I respectfully request that The Ohio State University, along with other similarly situated academic instiutions, be permitted to join in a brief, *amicus curiae*, in favor of this matter of vital public interest.

(Letter of E. Gordon Gee to Bert Montague, Clerk, United States Court of Appeals for the Fourth Circuit of 9/21/92, at 2.)

Under the law expressed by the district court, and as applied by other circuits and state supreme courts, cooperative research efforts among scholars, students, and private discoverers had been assured of continuing. Private discoverers have been willing to participate in these cooperative efforts because they knew they would be able to enjoy the full benefit of the financial rewards of their efforts. The court of appeals' decision will inevitably chill that cooperative spirit by reducing the financial rewards available to private discoverers. Those discoverers will be required to bear the unrealistic burden of proving that property lost at sea for centuries was "abandoned" by an express disclaimer of title, or risk losing much, if not all, of their financial reward. In any event, discoverers will face substantial uncertainty about title that will make commercial financing for such projects impossible and private venture financing problematic.

B. Legal Predictability Is Essential to Continued Participation by Scholars and Academicians in Deep Ocean Exploration, and Will Advance Study and Conservation of Long-Lost and Abandoned Shipwrecks

One of the most insidious implications of the court of appeals' decision will be to encourage some private discoverers to "cut corners" and exclude participation by scholars and academicians, so as to minimize the risks that their discoveries will become widely-known and that they may then have to share their financial rewards with others. The participation of various academic disciplines

has led to appropriate recognition of the archaeologic, historic, and scientific attributes of the entireties of shipwreck sites. Those values will be jeopardized if private discoverers' efforts are subject to unpredictable division and distribution, among claims scores of years old, upon the discoverers' return to shore.

A key to gaining information hidden within a long-lost shipwreck is to study the site as a whole. This requires understanding the complete shipwreck site, not simply treating it as a place to "recover a lot of stuff" having transitory salvaged commercial value. *The Sea Remembers* 26 (Peter Throckmorton ed., 1987). Proper historical analysis of shipwrecks demands that particular items from the site be studied in relation to everything else at the site:

> Until something on the bottom was understood in its relationship to everything else, it stayed on the bottom. Recovery could take place only when everything on the site was well recorded, in place. The sequence would be surveying, drawing, photography, and more drawing with the help of photography.

Id.

As cultural deposits, shipwrecks provide valuable information about history, commerce, and warfare. We learn not only from their cargoes, but also from their structures, and from the utensils, plates, glassware, cutlery and clothing found aboard such wrecks. "As such they can be understood as potential museums of temporal context preserving a collection of items and also a narrative segment of history which their routes, logs, and wreckage present to the archaeologists as a unique challenge to preserve. In some cases they provide extremely rare evidence." Anne G. Giesecke, *Shipwrecks: The Past in the Present*, 15 Coastal Management 179, 180 (1987). Beyond the archaeological and historical benefits of exploring the intact shipwreck site as a whole, natural scientists gain invaluable insights to understanding the undersea eco-system through careful recording and cataloguing of data from the site.

Under the court of appeals' decision, private discoverers will be less inclined to devote the necessary man-hours and equipment time to preserving shipwreck sites for appropriately conducted research, and more inclined to hide their finds or information about them. The lack of concern that the world's insurance underwriters have for the historic and scientific value of shipwrecks and shipwreck sites is underscored by the fact that the standard salvage agreement used by marine underwriters places no duty upon the salvor to protect the scientific, historic, or archaeological value of the shipwreck site or its artifacts, and, on the contrary, is based on the rule of "no cure, no pay." *See generally* Nicholas J. J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Salvage Agreement*, 16 Tul. Mar. L. J. 1 (1992).

Even more disturbing is the prospect that discoverers may seek to avoid the cumbersome and costly litigation created by the Fourth Circuit's approach altogether, by secreting their finds or hiding information. While nothing can fully prevent the unscrupulous in any endeavor, the law should encourage those who responsibly seek to protect the scientific, historic and archaeological attributes of shipwreck sites—and at the very least, the law should not penalize inquiry into such information or provide an incentive to secrete finds. One very important way to ensure the continued sharing of that access is to allow those who bear the enormous financial risk of shipwreck discovery and recovery to reap their full financial reward.

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL AND THE STATES, THUS FOSTERING UNCERTAINTY AND UNDERMINING INCENTIVES FOR PRIVATE EXPLORATION OF THE DEEP SEAS, AND IMPEDING REALIZATION OF THE RESEARCH AND EDUCATIONAL POTENTIAL OF LONG-LOST AND ABANDONED SHIPWRECKS

A. Whether Admiralty Courts May Infer Abandonment of Long-Lost Shipwrecks Based Upon Passage of Time, Non-use and Other Facts and Circumstances Presents an Important Federal Question Affecting Developing Technologies for Maritime Exploration and Preservation

The Fourth Circuit's decision comes at a time when the question of abandonment of long-lost shipwrecks, and the national importance of marine technology and ocean sciences for exploring, recovering and conserving shipwrecks and other resources, have been expressly recognized by the Congress and the President. Approximately 50,000 shipwrecks are located within the navigable waters of the United States, and many have historical and other significance. H.R. Rep. No. 514(I), 100th Cong., 2nd Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365. Many more are located in international waters.

Technological advances have made access to shipwrecks easier, creating greater interest in them. *Id.* A variety of groups, including historians, explorers, archaeologists, scientists, divers, salvors, and the general public, are affected by the immediate "recreational, preservation and commercial" considerations of historic shipwrecks. Such shipwrecks may contain both historic and scientific information, as well as artifacts—all of which are subject to being destroyed and lost to present and future generations forever. *See id., reprinted in* 1988 U.S.C.C.A.N. at 366.

The national importance of the question of abandonment of long-lost shipwrecks, and the development of marine technology for exploring these and other ocean resources, is illustrated by legislation enacted by Congress with the President's approval. *See, e.g.*, Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106 (Supp. 1992). As expressed by Congress, it is the policy of the United States to encourage private investment enterprise in exploration, technological development, marine commerce and utilization of ocean resources, including development and improvement of vehicles, equipment and instruments for such exploration, research and recovery. 33 U.S.C. § 1101(b)(3), (6) (1988). Twenty-seven states have passed legislation concerning historic shipwrecks.

The issues associated with abandoned shipwrecks have been the subject of much litigation in both state and federal courts, and the importance of the issue promises to continue. *See* H.R. Rep. No. 514(I), 100th Cong., 2nd Sess. 1, *reprinted in* 1988 U.S.C.C.A.N. 365. The legislative history of the Abandoned Shipwreck Act underscores this assertion:

> The Committee notes that the term "abandoned" does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

Id. The question of abandonment is central to the legislation:

> Abandoned shipwrecks within the scope of this Act include those which have been deserted and to which the owner has relinquished all ownership rights. Except in the case of U.S. warships or other public vessels (which require an affirmative act of abandonment), the act of abandonment may be implied or inferred from the circumstances of the shipwreck as

> when an owner has never asserted any control over or otherwise indicated a claim of possession.

H.R. Rep. No. 514(II), 100th Cong., 2nd Sess. 1, 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 370, 374.

B. The Decision Below Creates a Conflict With Other Circuit Courts and State Supreme Courts Concerning Whether Admiralty Courts May Continue to Infer Abandonment of Long-Lost Shipwrecks Based Upon Circumstantial Evidence

The Fourth Circuit's decision is in conflict with the opinions of the First, Fifth and Eleventh Circuits, which allow admiralty courts to infer abandonment of long-lost shipwrecks based on circumstantial evidence, such as the passage of time, non-use, and other facts. *See, e.g., Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978). *See also Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981).

The vast majority of district courts, and all the state supreme courts, recognize the propriety of inferring abandonment, even absent an express renunciation of title by a claimant to ownership. *Indian River Recovery Co. v. The China*, 645 F. Supp. 141, 144 (D. Del. 1986); *Massachusetts v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 552 (Mass. 1988); *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd without opinion*, 775 F.2d 302 (11th Cir. 1985). This is the appropriate rule, both based on the weight of precedent and the policy considerations underlying that precedent.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1189

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE OF TEACHERS AND ADMINISTRATORS OF SECONDARY SCHOOLS, EDUCATIONAL TELEVISION, HAM RADIO OPERATORS, AND OTHERS INTERESTED IN PUBLIC EDUCATION IN SUPPORT OF PETITIONER

Teachers and administrators of secondary schools, educational television, ham radio operators, and others interested in public education * hereby move, pursuant to

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* These educators and administrators include Reggy Brasington, Director of Grants and International Development, University of South Carolina; Ms. Carol Wolfenbarger and Ms. Patti Bricker, both of Pleasantview Middle School in Grove City, Ohio; Ms. Donna Schell, Mountainside Middle School, Scottsdale, Arizona; Dr. Mary Kennerly, Principal, Nursery Road School, Columbia, South Carolina; Dr. Michael Turner, Assistant Superintendent for Instruction,

Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

This group of *amici curiae* seeks to encourage curiosity and stimulate learning by providing a variety of educational opportunities to secondary school children. This group believes that the exploration of abandoned shipwrecks provides a significant educational programming opportunities, and supports policies that promote and encourage exploration and discovery. The challenge of locating and recovering deep-water shipwrecks was considered impossible just 40 years ago. Today, modern telecommunications enable people to participate in a unique voyage of discovery to the bottom of the deep seas. This "live documentary," can be customized to meet the expectations of specific audiences. The end result is an extraordinary opportunity for shared exploration, discovery and adventure in what has become the age of public discovery. Daniel J. Boorstin, *Discoverer & Inventors, in Inventors and Discoverers: Changing Our World* 6, 11 (National Geographic ed., 1988).

Interactive videodiscs have been created, based on the *S.S. Central America* Project, as an educational multimedia collection geared to middle and secondary schools. Video segments from the *S.S. Central America* project

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Lexington, South Carolina; Dr. Joan Assey, Director of Staff Development, Columbia, South Carolina; Ms. Beverly Heoitt, Teacher in the Performance Based Program for Dropout Prevention and Retrieval, Columbia, South Carolina; Mrs. Aleda Anderson, Coordinator of Computer Education, Ballentine, South Carolina; Ms. Katherine Famall, Coordinator of Science Education, Ballentine, South Carolina; Mr. Bob Truex, President Emeritus of Columbia Amateur Radio, Ridgeway, South Carolina; Ms. Roberta Ferrell, Coordinator of Academically and Artistically Gifted Programs, South Carolina; Tom Clark, Vice President for Production, South Carolina Educational Television; Charles Carmichael, Science Teacher, Lexington School District One.

include more than 300 diagrams, maps, charts, and still photos to further illustrate key ideas and concepts. Using the interactive library, teachers and students can quickly find the segments they need and arrange them to create lesson plans and student reports. Curriculum topics include the scientific method, marine biology, deep sea ecosystems, archaeology, marine technology, United States history, economics, the history of gold, and problem solving.

In addition to the interactive videodiscs, Columbus-America Discovery Group has created numerous educational opportunities for secondary schools studying the historical and scientific findings and technological developments of the *S.S. Central America* Project. For instance, the Columbus-America Discovery Group visited secondary schools and allowed children to communicate live, via ham radio operators, with the Columbus-America Discovery Group's ship in the Atlantic Ocean.

Educational opportunities are available not only to the young, but to students of all ages. The exploration of shipwrecks offers a unique interdisciplinary educational opportunity. Few programs of study incorporate so many disciplines into a single program as the exploration of abandoned shipwrecks. Abandoned shipwrecks present a window in time, allowing students to understand the important role history plays in every day life.** The study of long-lost shipwrecks allows students to experience life as it was lived in a bygone era.

However, the *amici curiae* believe that if the Fourth Circuit's decision is allowed to stand, opportunities for educational endeavors such as those mentioned above will simply not exist. By affording ageless vitality to stale claims many decades old, the Court of Appeals' decision

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** For example, without years of extensive historical research, Columbus-America may not have discovered the Central America's location.

serves to discourage both venture capitalists from investing in shipwreck discovery and entrepreneurs from starting discovery groups, all of which will result in the loss of educational opportunities.

For these reasons, the Court should grant this motion for leave to file the attached brief amici curiae in support of the petitioner.

Respectfully submitted,

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February 16, 1993

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICI CURIAE OF TEACHERS AND ADMINISTRATORS OF SECONDARY SCHOOLS, EDUCATIONAL TELEVISION, HAM RADIO OPERATORS, AND OTHERS INTERESTED IN PUBLIC EDUCATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

Amici are a group of individual teachers and administrators in secondary schools in different parts of the nation, executives for educational television, directors of school programs for the gifted, programs for dropout prevention and retrieval, ham radio operators, as well as various other individuals interested in education and the opportunities offered by long-lost and abandoned shipwrecks as a tool for advancing public and private educa-

tion.[1] During the *S.S. Central America* Project, each has been involved in, or impressed by, the interdisciplinary nature of the discovery, recovery and conservation of long-lost and abandoned shipwrecks.

Because of the inherently fascinating attributes of long-lost shipwrecks, they are wonderful devices for capturing, and maintaining, the attention of people of all ages—especially students who are in the formative years. Moreover, the study of such shipwrecks requires involvement of a number of different fields of human learning, including the fine arts (such as photography), physical sciences (such as biology) and social sciences (such as history).

Amici are deeply distressed over the court of appeals' decision, and its practical effects on projects for deep sea exploration, such as the *S.S. Central America* Project. Because of the tremendous educational opportunities provided by such projects, and the need for ample incentives, certainty and predictability in the law to allow development of the needed technologies and educational programs

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[1] These educators and administrators include Reggy Brasington, Director of Grants and International Development, University of South Carolina; Ms. Carol Wolfenbarger and Ms. Patti Bricker, both of Pleasantview Middle School in Grove City, Ohio; Ms. Donna Schell, Mountainside Middle School, Scottsdale, Arizona; Dr. Mary Kennerly, Principal, Nursery Road School, Columbia, South Carolina; Dr. Michael Turner, Assistant Superintendent for Instruction, Lexington, South Carolina; Dr. Joan Assey, Director of Staff Development, Columbia, South Carolina; Ms. Beverly Heoitt, Teacher in the Performance Based Program for Dropout Prevention and Retrieval, Columbia, South Carolina; Mrs. Aleda Anderson, Coordinator of Computer Education, Ballentine, South Carolina; Ms. Katherine Famall, Coordinator of Science Education, Ballentine, South Carolina; Mr. Bob Truex, President Emeritus of Columbia Amateur Radio, Ridgeway, South Carolina; Ms. Roberta Ferrell, Coordinator of Academically and Artistically Gifted Programs, South Carolina; Tom Clark, Vice President for Production, South Carolina Educational Television; Charles Carmichael, Science Teacher, Lexington School District One.

to continue, and because they believe that confusion and conflict in the applicable legal regime hurt us all, *Amici* respectfully request the Court to grant review.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE DECISION OF THE COURT OF APPEALS RAISES AN ISSUE OF SUBSTANTIAL IMPORTANCE BECAUSE IT THREATENS TO DIMINISH INVALUABLE EDUCATIONAL OPPORTUNITIES MADE POSSIBLE BY MODERN TELECOMMUNICATIONS

A. Developments in Marine Technology, Coupled With the Recognition of the Doctrines of "Telepresence" and "Telepossession," Enable People Worldwide to Participate in the Exploration and Discovery of the Deep Sea and Other Remote Environments

The urge to discover has led people to the most isolated areas of the planet, from its highest mountains to its icebound poles, on to the moon and beyond. But one frontier has stubbornly resisted exploration: the deep ocean. It is this frontier that Columbus-America was created to explore.

The challenge of recovering deep-water shipwrecks was considered very difficult, if not impossible, just 40 years ago. Only in the last several decades has sonar technology been developed that allows broad-swath scanning of the ocean floor. And now, submersibles have been designed that are capable of performing a full range of precise recovery tasks in the deep ocean.

The recovery vehicle *Nemo*, developed by Columbus-America, is one such device. *Nemo* is equipped with stereo, video, and still cameras, and uses robotic arms to retrieve artifacts. While earlier submersibles were designed for limited survey and sampling, *Nemo* is designed to perform the far more difficult and delicate tasks re-

quired for full recovery. Furthermore, *Nemo* is entirely remote-controlled. *Nemo* is operated by a crew of scientists and technicians who control the vehicle's movements with the aid of teleoperational systems. *Nemo*'s design, sophisticated sensing and imaging capabilities, and operational precision are on the cutting edge of deep-water technology.

The use of remotely operated vehicles (ROVs), such as *Nemo*, make it substantially more efficient to explore the depths of the seas. ROVs have necessitated the emergence of two new legal doctrines, "telepresence" and "telepossession". These doctrines substitute the presence of an ROV for actual human presence in the ocean, allowing the human operator to acquire legal possession and presence. *Columbus-America Discovery Group v. Unidentified, Wrecked And Abandoned Sailing Vessel*, 1989 A.M.C. 1955, 1958 (E.D.Va. 1989). Acquiring possession and title of an object through telepossession requires: 1) locating the object; 2) real time imaging of the object; 3) ability to place teleoperated or robotic manipulators near the object that are capable of manipulation through human direction; and 4) present intent to control the location. *Id.; see also* Drew F.T. Horrell, Note, *Telepossession Is Nine-Tenths Of The Law: The Emerging Industry Of Deep Ocean Discovery*, 3 Pace Y.B. Int'l. Law 309, 339 (1991). Control may be exercised through a combination of live video-feed, computer imaging, still photos, and manipulation by the robotic arms of ROVs. *Columbus-America*, 1989 A.M.C. at 1958.

Modern telecommunications allowing such "telepresence" also enable people to participate in a unique voyage of discovery to the bottom of the deep seas. The vehicle is the "live documentary," which can be customized to meet the expectations of specific audiences. The end result is an extraordinary opportunity for shared exploration, discovery and adventure in what has become the age of public discovery. Daniel J. Boorstin, *Discoverers &*

Inventors, in Inventors and Discoverers: Changing Our World 6, 11 (National Geographic ed., 1988).

B. Deep Sea Exploration and Discovery of Abandoned Shipwrecks and Other Abandoned Maritime Items Provide New Opportunities for Millions of Individuals for Education, Enjoyment, and Adventure

Although the great explorers are part of our collective heritage, they are distant, both in time and ideas. However, there are many modern day discoverers, such as Columbus-America's Thommy Thompson, who have tales of exciting adventures to tell. Through the doctrines of "telepresence" and "telepossession," television can bring their stories to millions so that we can all share in their explorations and adventures.

In cooperation with Columbus-America, "Treasures of a Lost Voyage" has been aired on the Discovery Channel and is now available on home video. Millions of viewers have joined the team of high-tech adventurers and scientists on the most ambitious effort at deep-water discovery ever undertaken. In "Treasures of a Lost Voyage," *Nemo* is shown locating hundreds of millions of dollars worth of gold dating back to the California Gold Rush. This video advances the public's understanding of American history as well, prefacing Columbus-America's efforts with an account of the California Gold Rush and the events that led up to the sinking of the *S.S. Central America*.

Based on the *S.S. Central America* Project, the Discovery Channel has also developed two videodisc curricula on investigating science and history as part of its Interactive Library. The Discovery Interactive Library is an educational multimedia collection geared to middle and secondary schools. Each title in the Library is effective on videodisc alone or on videodisc used in conjunction with a personal computer. Video segments from the *S.S. Central America* Project include more than 300 diagrams,

maps, charts, and still photos to further illustrate key ideas and concepts. Teachers and students can quickly find the segments they need and arrange them to create lesson plans and student reports. The program includes a bound Classroom Guide containing an overview of the contents of the videodisc, which allows teachers to develop lesson plans without access to a videodisc player. The Guide also provides a framework for students using the video material in individual and team projects.

A simulation on one of the discs allows students to employ the scientific method to find and explore the gold-laden wreck of the *S.S. Central America.* Through the camera's eyes on a robotic submarine, students can view the 133-year-old ship and encounter a rich array of aquatic life a mile and a half under the sea. They learn how the scientists use modern technology to study ancient forms of life. The disc also presents a taxonomy of deep-sea species found around the wreck site. Curriculum topics include the scientific method, marine biology, deep sea ecosystems, archaeology, and marine technology.

Another videodisc allows students to journey back to 1857, when the *S.S. Central America* sank. They can experience the California gold rush, westward expansion, changing social values, and new technologies. Curriculum topics include U.S. history, economics, the history of gold, and problem solving.

Columbus-America has created an Education Program to provide an outreach function to schools for the purpose of disseminating the historical and scientific findings and Project. This Project presents many extraordinary educational opportunities including (1) the stimulation of student interest in a variety of different disciplines, (2) the development of students' creativity, independent thinking, and problem-solving skills, and (3) the demonstration of the value of interdisciplinary teamwork to solve complex problems.

Six South Carolina schools have communicated live with members of the *S.S. Central America* Project via ham amateur radio. A dozen crew members, including Project director Tommy Thompson, spent two hours on three different days responding to questions from students. The students asked the crew members such questions as how much the gold bars found aboard the *S.S. Central America* were worth when it sank, and how much they would be worth today. Students also wanted detailed information on *Nemo*, water pressure, oceanography, and topography. The radio communications were incorporated into math, science, language, social studies, and technological experiences. Students calculated the monetary value of the gold bars, followed the history of the gold rush, studied eels, sharks, and other ocean life forms, and plotted the latitude and longitude of the ship.

Educational opportunities are available not only to the young, but to students of all ages. The exploration of shipwrecks offers an unique interdisciplinary educational opportunity. Few programs of study incorporate so many disciplines into a single program as the exploration of abandoned shipwrecks. Abandoned shipwrecks present a window in time, allowing students to understand the important role history plays in every day life.[2] The study of long-lost shipwrecks allows students to experience life as it was lived in a bygone era.

Shipwrecks are equally valuable as a tool for exploring the natural sciences. The scientific method can be applied to deep sea expeditions, giving students fascinating new ways of looking at topics which previously held little interest for them. The deep-sea ecosystem created by shipwrecks can be explored and analyzed, and the ocean's organisms studied. The study of shipwrecks provides an effective method for teaching students about the physi-

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[2] For example, without years of extensive historical research, Columbus-America may not have discovered the *S.S. Central America's* location.

cal, chemcial, geological, and biological nature of the oceans. The properties of specific materials such as wood and gold and the effects of different elements on them can easily be taught and understood. An important educational aspect of teaching about shipwrecks is that students are at once able to learn real life applications of their studies. Students find that learning can be interesting and exhilarating. Studying shipwrecks encourages students to acquire an appreciation of the important roles that the humanities, social sciences, and physical sciences play in our lives. Most importantly, the study of shipwrecks and deep sea exploration sparks the imagination. Students can see firsthand how vision, hard work, ingenuity—and dreams—pay off in a free society.

Abandoned shipwrecks provide educational opportunities at many levels. For example, the exploration of the *S.S. Central America* has provided opportunities for advanced scientific education. For underwater biologists, the recovery operation offers a rare opportunity to study a deep water ecosystem in action. In the dark, cold, barren environment of the Blake Ridge, the *S.S. Central America* has become a biological oasis, home for a host of attached and free-swimming animals. Scientists from several universities have accompanied the project team in order to obtain new and unusual specimens of aquatic life for our national collection. In addition, the *S.S. Central America* Project is important as a pioneering venture in the new field of deep-water exploration. The Project has shown that it is possible not only to study, but also to retrieve, items of value that lie a mile or more beneath the ocean surface. And it has done so without government funding. The implications for the future of privately funded scientific exploration are intriguing.

Given the ongoing public fascination with the *S.S. Central America* Project, the continuing exploration at the shipwreck site, and the promise of greater historical, scientific, and numismatic findings, these educators believe that the *S.S. Central-America* Project has the poten-

tial to provide enormous educational benefits for many years to come.

II. THE COURT OF APPEALS' OPINION IMPROPERLY BURDENS THOSE WHO RECOVER ABANDONED SHIPWRECKS AND OTHER ABANDONED MARITIME ITEMS WITH A CLOUD OF LITIGATION AND STALE CLAIMS

The Court of Appeals' decision breaks with other circuits that either recognize a presumption of abandonment or draw an inference of abandonment from circumstantial evidence. The Court of Appeals imposes the burden upon the finder of proving abandonment by clear and convincing evidence "such as an owner's express declaration abandoning title" in any case where one purporting to have succeeded to the original owner's interest appears to assert a claim. Pet. App. 27a.

By allowing ageless vitality for stale claims many decades old, the Court of Appeals' decision could likely chill future deep-sea discovery. This serves to discourage both venture capitalists from investing in shipwreck discovery and entrepreneurs from starting discovery groups, all of which will result in the loss of educational opportunities.

The Court of Appeals' decision promotes litigation and delay. The decision invites the presentation of stale, speculative, and possibly fraudulent claims against every finder of a long-lost shipwreck, imposing costly and time-consuming litigation on every such expedition, and assuring the scavenging of long-lost claims by enterprising counsel, which under the decision below, threatens to become a more profitable industry than the exploration of long-lost shipwrecks by high-tech entrepreneurs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF TITANIC INTERNATIONAL, INC. AND DESCENDANTS OF PASSENGERS AND CREW MEMBERS ABOARD THE S.S. CENTRAL AMERICA DURING HER FINAL VOYAGE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE OF TITANIC INTERNATIONAL, INC. AND DESCENDANTS OF PASSENGERS AND CREW MEMBERS ABOARD THE S.S. CENTRAL AMERICA DURING HER FINAL VOYAGE IN SUPPORT OF PETITIONER

Titanic International, Inc. and descendants of passengers and crew members aboard the *S.S. Central America* * hereby move, pursuant to Rule 37.2 of the

* These descendants are Captain Herndon Oliver III, USN, and Herndon Oliver, Jr. (descendants of the Captain Herndon who was at the helm of the *S.S. Central America* during her last voyage), Linda Beaver, James F. Bell, Marge Bethard, Charlotte K. Boardman, Elizabeth B. Carrick, Florence Cheeseman, Dottie Smith Dicks, Henry Doerr, Wanda Lee Smith-Dreon, Ruth Hull Falk, Albro T. Gaul, Fred Grant, Genevieve Ellis Gross, Charles Henderson, Nor-

Rules of this Court, for leave to file the attached brief as *amici curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

Titanic International, Inc. is a New Jersey nonprofit corporation dedicated to preserving the history of great ocean liners and the people who sailed them. Named for the most famous ocean liner ever, the *RMS Titanic*, Titanic International celebrates all passenger ships. The group of descendants of passengers and crew members aboard the *S.S. Central America* during her final voyage is comprised of various descendants of passengers and crew members of the *S.S. Central America* when she headed to New York from Havana in September 1857. The *S.S. Central America* Project has provided these descendants with some of the few links they have to their past, thus enriching their family histories and our national heritage.

The historical information that shipwrecks can provide gives everyone a rare opportunity to look back into the lives of the passengers and crew members aboard the doomed ships. For many of the descendants of those who have perished in maritime disasters over the years, their only opportunity to learn about their ancestors is provided by historical accounts and analysis of the personal belongings that were lost on the high seas.

The recovery and excavation of the *S.S. Central America* by Columbus-America Discovery Group has led to a new understanding of the lives of the passengers and crew members aboard the doomed ship. In light of the uncertainties and disincentives created by the Fourth Circuit's opinion as a whole, it is apparent that the opinion may well result in the wholesale destruction of shipwreck sites by salvors seeking to maximize monetary gain.

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mand Klare, Patricia Hull Milan, Blair Pomeroy, Jane Look Renard, Dorothea Schweiger, William W. Smith, Glova Spears, Linda Stanton, John C. Tayloe, Henry G. Taylor and Dale W. Wade.

For these reasons, the Court should grant this motion for leave to file the attached brief *amici curiae* in support of the petitioner.

Respectfully submitted,

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QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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INTEREST OF THE AMICI CURIAE

Titanic International, Inc. is a New Jersey nonprofit corporation dedicated to preserving the history of great ocean liners and the people who sailed them. Named for the most famous ocean liner ever, the *RMS Titanic*, Titanic International celebrates all passenger ships. Titanic International actively supports research concerning maritime history, and many of its members are active maritime researchers, compiling statistics and data concerning historic ships.

The group of descendants of passengers and crew members aboard the *S.S. Central America* during her final

voyage is comprised of various descendants of passengers and crew members on the *S.S. Central America* when she headed to New York from Havana in September of 1857.[1] The *S.S. Central America* Project provided these descendants with some of the few links they have to their past, thus enriching their family histories and our national heritage.

These *amici* believe that if the decision below is allowed to stand, it will seriously undermine efforts to recapture our lost heritage, not only in this case but also in future cases.

SUMMARY OF ARGUMENT

Materials and artifacts recovered from long-lost shipwrecks can provide invaluable information for us all. Information can serve as a telescope into our past, clarifying and defining events and information we formerly saw only hazily, if at all. The historical information that shipwrecks can provide gives everyone a rare opportunity to look back into the lives of the passengers and crew members aboard the doomed ships. For some people, such as the descendants of passengers and crew members on the final voyage of the *S.S. Central America*, historical analysis and scientific information about the material recovered from a shipwreck may be the only heritage from ancestors—a heritage that passes into our common culture as a nation.

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[1] These descendants are Captain Herndon Oliver III, USN, and Herndon Oliver, Jr. (descendants of the Captain Herndon who was at the helm of the *S.S. Central America* during her last voyage), Linda Beaver, James F. Bell, Marge Bethard, Charlotte K. Boardman, Elizabeth B. Carrick, Florence Cheeseman, Dottie Smith Dicks, Henry Doerr, Wanda Lee Smith-Dreon, Ruth Hull Falk, Albro T. Gaul, Fred Grant, Genevieve Ellis Gross, Charles Henderson, Normand Klare, Patricia Hull Milan, Blair Pomeroy, Jane Look Renard, Dorothea Schweiger, William W. Smith, Glova Spears, Linda Stanton, John C. Tayloe, Henry G. Taylor and Dale W. Wade.

Other countries around the world have recognized the extraordinary historical opportunity that shipwrecks may provide. Thus, these countries have provided for the protection of underwater cultural heritage by giving special protection to long-lost artifacts recovered from the sea. However, if the decision below is allowed to stand, it will lead to the destruction of irreplaceable artifacts from bygone eras. Thus, the *amici* respectfully request the Court to grant certiorari in this case.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE COURT'S REVIEW OF THIS CASE WILL AFFORD US AN OPPORTUNITY TO RECAPTURE OUR LOST HERITAGE

Ships were the single largest movable objects known to early man. To venture onto the open seas in them was often as daring as going to the moon today; to overcome the formidable violence of the sea is a marvelous feat. Although it is difficult to appreciate the challenges faced by those who traveled the high seas in centuries past, not all must be left to the imagination. Ships from all eras of history have survived, and they reveal to us better than anything else the skillful cunning, craftsmanship, strength and courage that our ancentors used to fight the often relentless forces of the seas. *See generally* Keith Muckelroy, *Maritime Archaeology* (1978). However, if the Fourth Circuit's decision is allowed to stand we will be deprived of the opportunity to learn the many lessons about our past that shipwrecks have to offer.

A. Shipwrecks And Their History Aid In The Study Of Genealogy By Providing Information About Our Ancestors And Our Heritage

For many of the descendants of those who have perished in maritime disasters over the years, their only opportunity to learn about their ancestors is provided by historical accounts and study by scientists and historians

of the personal effects that were lost on the high seas. The case of the *S.S. Central America* is no exception.

"[L]ike the crew and passengers of the Titanic, those aboard the Central America were a varied and colorful lot." Ken Ringle, *Salvaging the Gold of History*, Wash. Post, Nov. 29, 1990 at D1, D8. The passengers and crew of the *S.S. Central America* represented a cross-section of nineteenth-century America and included wealthy tycoons, "Forty-Niners," newlyweds, lawyers, doctors, bankers and even a former dance hall girl. Some of the more notable passengers were Billy Birch, star of the famous San Francisco Minstrels, Ansel and Adeline Easton, a young couple who had exchanged wedding vows only the day before their departure from California; Rufus Allen Lockwood, one of the finest lawyers in California; and Sammy Shreve, founder of Shreve & Co., San Francisco Jewelers. *See* Judy Conrad, *Voices From The Past: Final Voyage*, American History Illustrated, Mar.-Apr. 1991, at 58, 60. Thirty-one of the almost five hundred passengers were women and twenty-nine were young children. For several of the passengers, this was their first ocean voyage; others were businessmen who regularly traveled coast-to-coast. *Id.* at 60.

The passengers enjoyed good sailing weather and spirits were high as they traveled the first leg of their trip from California to Panama. Adeline Easton later recalled that voyage in her memoirs as "one long delight, with smooth waters, sunny skies and a joyous, congenial company." *See* Ringle, *supra*, at D8. The trip to New York from Havana, however, was not so glorious as the skies darkened and the *S.S. Central America* sailed into the fringe of a hurricane. As the storm raged, the passengers and crew members fought valiantly to keep the sidewheel steamer afloat, but their efforts were to no avail.

Upon learning that the *S.S. Central America* was doomed, the highest order of heroism was displayed by all

aboard. Captain Herndon immediately gave orders "that none but the ladies and children should get into the [life] boats, and he was obeyed to the letter." *Story of an American Tragedy* 33 (Judy Conrad ed., 1988) (quoting Frank Jones, New York Daily Tribune, Sept. 21, 1857, at 6). The passengers of the ill-fated *S.S. Central America* acted with "coolness and self-control . . . not a man attempted to get into the boats." *Id.* One passenger observed, "[t]he dangerous, heroic and almost superhuman effort in transferring the women and children in safety to the brig *Marine*, [a passing ship], can scarcely have a parallel." *Id.* (quoting Obed Harvey, Mountain Democrat, Nov. 14, 1857, at 1).

Among all the tales of heroism, the accounts of Captain Herndon shine the brightest. He kept discipline and control in the face of chaos. He assured that all of the women and children were saved before the *S.S. Central America* sank into the depths of the sea. Captain Herndon's brother-in-law and fellow naval officer later recounted:

> Just before the steamer went down, a rowboat was heard approaching. Herndon hailed her; it was the boatswain's boat, rowed by 'hard hands and a gentle heart,' returning from the Brig to report her disabled condition. If she came alongside, she would be engulfed with the sinking ship. Herndon ordered her to keep off. She did so, and was saved. This, so far as I have been able to learn, was his last order. Forgetful of self, mindful of others, his life was beautiful to the last; and in his death he has added a new glory to the annals of the sea.

Letter from Matthew Fontaine Maury, Lieutenant U.S. Navy, to Issac Toucey, Secretary of the Navy, 6 (Oct. 19, 1857) (on file with the National Archives).

Along with tales of heroism were tales of tragedy, including the story of Mary Swan and her husband. Married but a short time and with a newborn child, they

said their last goodbyes to each other shortly before the *S.S. Central America* slid beneath the dark waves. As Mary Swan later recalled,

> [h]e [her husband] said, 'I don't know that I shall ever see you again.' He was very glad to think that I could be taken off. He wanted me to go, and said that he did not care about himself, if it were possible that I could be saved, and the little child. He told me he would try to save himself if an honorable opportunity should present itself after all the women were taken off. He had been sick for three or four days before the disaster, but notwithstanding this, he persisted in keeping his place at the pumps.

Conrad, *supra*, at 33 (quoting Mary Swan, New York Times, Sept. 21, 1857 at 4). Another survivor recalled that after the final life boat approached the rescue ship without her husband,

> I put my face down in my hands, too wretched to speak, reproaching myself that I had not stayed with him, regretting that I had not defied the Captain and all when they ordered us to leave.

Id. at 41 (quoting Adeline Mills Easton, *Lincoln* 26).

B. Information And Analysis Of The Personal Belongings Recovered From Shipwrecks Are Often Our Only Heritage From Those Who Perished In Maritime Disasters

For many of the individuals claimed by the tragedy of shipwrecks, especially the younger passengers, study and analysis by historians of the very items they carried aboard the ill-fated vessels add to our heritage, helping to paint often vivid pictures of those who perished. For example, archaeologists were able to determine a great deal about a certain passenger from the personal possessions found with the wreck of a small Greek trading vessel. The personal belongings found included:

> a pair of very smooth stone mace-heads of the sort that were used for hammering bronze. There were also polishers and whetstones and three large flattish stones of the type used as anvils in the days before iron was available. So there had evidently been a tinker on board. To him also would have belonged the set of balance-pan weights, which were necessary for calculating the price of scrap metal . . . [a] cylinder seal, an essential then for any merchant to mark his goods, was Syrian, as was the only oil lamp found. Altogether the finds suggested . . . a Syrian scrap-metal dealer, who was also a tinker, making his way from Cyprus by the coast of Turkey to the Aegean, supplementing his rations with olives and fish, perhaps playing knuckle-bones in his spare moments by the light of a single lamp. It is a picture at once detailed and intimate . . . .

Paul Johnstone, *The Archaeology of Ships* 24-25 (1974).

Recovery operations at the site of the *S.S. Central America* have likewise uncovered numerous artifacts providing new information about the passengers and crew. In fact, several passenger trunks that survived through their 130 year sojourn on the ocean floor have already been recovered. One such trunk contained:

> varying sized sets of men's clothes . . . a half-dozen completely new top quality woolen undershirts and pairs of socks . . . a cache of cigars and chunks of tobacco, a shaving kit . . . and two books, *The Count of Monte Cristo* and . . . *Lady Lee's Widowhood*. . . .

Tim Noonan, *History Under the Sea*, American History Illustrated, July-Aug. 1992, at 59, 61. From various papers and letters found in the trunk, it was determined that the trunk had once belonged to John Dement. The intimate view of Mr. Dement given by his belongings makes it "almost as if Dement were being introduced to us across the years . . . ." *Id.*

> [A] nineteenth-century historical journal describes John Dement as a muscular, well-built man, rather

> above the average stature, with strong nerves, and apparently he is capable of retaining his presence of mind in emergencies—to which qualities he has been indebted under providence for the preservation of his life on several occasions.

Id. This was certainly the case on the fateful day that the *S.S. Central America* sank to the ocean floor. Dement spent thirteen hours in the water before becoming one of the last two people rescued by a passing ship. *Id.*

In addition to the trunks recovered from the *S.S. Central America*, "other artifacts recovered from the wreck offe[r] a peek at the habits, pretensions and sensibilities of America from the era." *See* Ringle, *supra*, Wash. Post, Nov. 29, 1990, at D8. In fact, a woman's ring recovered by the *S.S. Central America* Project has even led to knowledge about romantic customs of the pre-Civil War era. Although the first stone of the ring is missing, its space is followed by an emerald, a garnet, an amethyst, a ruby and a diamond. Research regarding the ring has revealed that "[a]t the time in the American West, it was customary for a gentleman of means who was attracted to a lady but not sufficiently so to propose marriage, to instead favor her with a ring solemnifying his 'regard' for her." *Id.* The missing stone was thus a ruby, hence the first letter of each stone spelled "regard".

II. THE FOURTH CIRCUIT'S STANDARD FOR PROVING ABANDONMENT RENDERS IT VIRTUALLY CERTAIN THAT LONG-LOST SHIPWRECKS AND THE FAMILY HISTORY THEY PROVIDE WILL BE DESTROYED

For the law of finds and its concomitant duty to preserve a shipwreck to apply, abandonment must first be found. *Columbus-America Discovery Group, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 1989 A.M.C. 1955, 1958 (E.D. Va. 1989). The law of salvage, however, imposes no duty to preserve or record *any* of

the invaluable historic, scientific, or archaeological information vital to historical preservation groups such as *amici* associated with the wreck.

The Fourth Circuit's majority opinion breaks with the case law recognizing that abandonment may be inferred or presumed from circumstantial evidence. It adopts a rule, unprecedented in cases dealing with long-lost shipwrecks, which requires the finder of long-lost shipwrecks to prove abandonment by "clear and convincing evidence, such as an owner's express declaration abandoning title," *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 464 (4th Cir. 1992), in any case where one purporting to have succeeded to the interest of an original owner appears and asserts a claim.

Because of the passage of time and other factors, there is rarely if ever any evidence that the owner of a long-lost shipwreck or cargo affirmatively renounced all rights to the property. Consequently, most courts facing the issue have held that there is a *presumption* of abandonment in cases of shipwrecks over 100 years old. *See, e.g., Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (presuming abandonment when property is "so long lost that time can be presumed to have eroded any realistic claim of original title"); *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (concluding that the "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths"); *Sub-Sal, Inc. v. The Debraak*, No. 84-296, 1992 U.S. Dist. Lexis 2461 (D. Del. Feb. 4, 1992) (holding that abandonment could be inferred in the case of vessel whose location remained unknown for nearly two centuries).

Where courts have not employed a presumption of abandonment, they have nonetheless recognized that

abandonment may be inferred from all of the relevant facts and circumstances, and that it may be determined entirely on the basis of circumstantial evidence. *See Hatteras, Inc. v. The U.S.S. Hatteras*, 1984 A.M.C. 1094, 1097 n.5 (S.D. Tex. 1981), *aff'd without opinion*, 698 F.2d 1215 (5th Cir. 1983). As noted in Judge Widener's dissent to the opinion below, this approach is also consistent with the law of abandonment applicable in non-maritime cases. *See, e.g., United States v. Manning*, 440 F.2d 1105, 1111 (5th Cir. 1971), *cert. denied*, 404 U.S. 837 (1971) ("Whether there has been an abandonment [of a house and car], of course, depends on all the relevant circumstances existing at the time.").

III. COUNTRIES AROUND THE WORLD RECOGNIZE THE IMPORTANCE OF PRESERVING OUR UNDERSEA CULTURAL HERITAGE

Among the countries of the world, America lags behind in its efforts to preserve and protect the underwater cultural heritage of the human race. *See generally* Anastasia Strati, *Deep Seabed Cultural Property And The Common Heritage of Mankind*, 40 Int'l and Comp. L.Q. 859, 863-94 (1991) (discussing the various conventions and treaties entered into by foreign governments to protect underwater cultural heritage).

The Fourth Circuit opinion, applying the law of salvage to long-lost artifacts, is at direct odds with the weight of international jurisprudence on historic shipwrecks. As one international scholar has noted:

> Salvage law provides one of the most inappropriate means to regulate access to marine archaeological sites. The protection of the underwater cultural heritage has never been an objective of this ancient maritime law, whose essence lies in the compensation of the salvor for rescuing maritime property in distress; nor was it ever acknowledged by admiralty until the recently recognized public interest of States in the preservation of historic shipwrecks off their coasts.

> The salvor works for profit and this is reflected in the carrying out of his operations. A good salvage practice might be one that destroys "piece-meal" a marine archaeological site, or neglects to record any of the finds. . . . It is on these grounds that the exclusion of salvage law has been recommended as a minimum requirement of the legal protection of the underwater cultural heritage at national level (citation omitted).

Strati, *supra*, at 872.

Other foreign countries thus follow international law and create a *presumption* that a shipwreck underwater for a certain number of years has historic value and therefore must be protected and preserved as an integral whole. The following countries have enacted legislation that specifically provides for time limits for protection of underwater remains:[2]

Denmark:	100 years underwater
Finland:	100 years old
New Zealand:	60 years underwater
Norway:	100 years old
South Africa:	50 years old
Sweden:	100 years underwater

Thus, the decision below is contrary to the approach taken by numerous other countries in protecting historic shipwrecks. While the opinion of the court below ostensibly encourages salvors to preserve historical and archaeological evidence, *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 468 (4th Cir. 1992), it imposes no duty to engage in such preservation. Moreover, in light of the fact that most commercial salvage—and virtually all salvage on behalf of subrogated insurance companies—is based on contract sal-

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[2] For a discussion of these time limits as well as general heritage legislation, *see* Strati, *supra*, at 872.

vage where the "no cure, no pay rule" applies, such encouragement is illusory. In light of the uncertainties and disincentive created by the opinion as a whole, it is apparent that the opinion may well result in the wholesale destruction of the shipwreck sites by salvors seeking to maximize monetary gain.

CONCLUSION

The *amici* recognize, in part from very personal experiences, that our maritime heritage is important now and to future generations. Much of that history, however, will be lost forever if the decision below is allowed to stand.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.
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ATLANTIC MUTUAL INSURANCE COMPANY, *et al,*
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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IN THE

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BRIEF IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTORARI

INTEREST OF THE SIGNATORY STATES AS AMICI CURIAE

Amici represent their States through their respective Offices of the Attorney Generals for the States of Florida, Ohio, North Carolina, Rhode Island, South Carolina and Virginia. Under the Abandoned Shipwreck Act of 1987, 43 U.S.C. Section 2102 *et seq.*, the States have been granted title to all historic shipwrecks that lie on or under their submerged lands. The Attorneys General are charge with applying and enforcing the Abandoned Shipwreck Act, as well as the implementing legislation passed by their respective States and other legislation applicable to the management and protection of long-lost, historic abandoned

shipwrecks. Because the States are concerned with the serious legal and practical consequences of the decision below on what is or is not abandoned; what activities, or lack thereof, constitute legal abaondoment; and the standard of proof for abandonment of long-lost shipwrecks, they respectfully request that the Court review the decision below.

REASONS FOR GRANTING THE WRIT

In addition to the reasons for granting the Writ as presented by the Petitioner, the Amici Curiae believe the Court's attention should also be directed upon the Court of Appeals' decision as it would affect the Abandoned Shipwreck Act of 1987, codified at 43 U.S.C. Section 2101 through 2106 (hereinafter "ASA"). While the ASA was not before or considered by the Court of Appeals, because the CENTRAL AMERICA sank far beyond the territorial jurisdiction of any State or the United States, the Court of Appeal's decision on what constitutes "abandonment" will have an adverse impact upon the States as the decision will place an undue burden on the States in their attempt to protect, preserve and display historic shipwrecks found abandoned on their respective sovereign submerged lands. The Court of Appeals' decision will judicially nullify useless Congress' attempt to transfer title to the wrecks to the States and Territories.[1] Since the decision of the Court of Appeals will have important implications for the future State and Federal management of historic shipwrecks under the ASA, and implementing state and federal statutes and regulations, the Court should accept this case.

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1 And, to the extent such historic shipwrecks lie on public lands owned or controlled by the Unites States (i.e. National Parks, National Seashores, and National Marine Sanctuaries), the United States too will be adversely affected.

I. THE DECISION OF THE COURT OF APPEALS MATERIALLY AFFECTS THE VAIBILITY OF THE ABANDONED SHIPWRECK ACT OF 1987 AND THE GOVERNMENTAL ABILITY TO PRESERVE HISTORIC SHIPWERECKS

A. Historic Preservation by the States

Initially, governments protected and preserved historic sites and properties, not through the use of historic preservation law, but through the law of eminent domain. Beginning with the seminal case of *United States v. Gettysburg Electric Railway*, 160 U.S. 668 (1896), this Court upheld the power of the government to acquire historic property through condemnation. The question before this Court was whether the United States had the power to condemn land in Gettysburg, Pennsylvania, for the creation, and then preservation, of the Civil War battlefield. *Id.* at 679. Finding that there was no doubt that the use of the land was a public use, *Id.* at 680, the Court stated

> [a]ny act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by congress, must be valid.

Id., at 681. This Court, thus, upheld the right of the United States to use the power of eminent domain to secure historic sites and properties.[2]

States, and local governments, also used eminent domain to acquire historic sites and properties. *See State v. Kemp,* 124 Kan. 716, 261 P. 556 (1927) [acquisition of the Shawnee Mission], *affirmed, Roe v. Kansas,* 278 U.S. 191 (1929) [based on *Gettysburg,* no doubt state has power to condemn land for historic site]; *Timmons v. South Carolina Tricentennial Commission,* 254 S.C. 378, 175 S.E.2d 805 (1970); *Flaccomio v. Mayor & City Council of Baltimore,* 194 Md. 275, 71 A.2d 12 (1950) [acquisition of house in Baltimore where the flag was made that flew over Ft. McHenry inspiring the "Star Spangled Banner"]; *Wechsler v. New York State Department of Environmental Conservation,* 153 A.D.2d 300, 550 N.Y.S.2d 749 (1990); *Coke v. Commonwealth, Department of Finance,* 502 S.W.2d 57 (Ct.App. Ky. 1974) [acquisition of Mary Todd Lincoln house in Lexington, Ky.]; *Cordova v. Tucson,* 16 Ariz. App. 447, 494 P.2d 52 (1972).

Beginning earlier this century, the Federal and State[3] governments went from relying upon the power of eminent domain to acquire historic sites and properties to enacting

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2 *See also Bayon Des Familles Development Corp. v. U.S. Army Corps of Engineers,* 541 F. Supp. 1025 (D. La. 1982) [acquisition of park land for the Jean Lafitte Historic Park]; *U.S. v. Certain Parcel of Land in City of Philadelphia,* 99 F. Supp. 714 (E.D. Pa. 1951) [acquisition of colonial buildings to be part of Independence National Historic Park].

3 *See* Appendix A for a listing of state and territorial laws protecting historic sites, properties and artifacts, including historic shipwrecks.

laws directly protecting and conserving historic sites and artifacts.[4] As this Court noted:

> In the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.

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4 In 1906 Congress joined the trend by enacting the Antiquities Act, 16 U.S.C. Sec. 431, *et seq.*, which has as its avowed purpose the protection and management of "objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States." 16 U.S.C. Section 431. In 1935, Congress added the Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. Section 461-467. The declaration of national policy of the Act is found in Section 461, which states in full:

> It is hereby declared that it is national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States.

Under the authority of the Historic Sites Act, Congress has acquired historic sites and properties valuable to American history such as Andersonville (Ga.) National Historic Site (Civil War prison), Carl Sandburg Home National Historic Site (North Carolina home of Carl Sandburg), Ford's Theater National Historic Site (Washington, D.C. location of the assassination of Abraham Lincoln), Hopewell Village National Historic Site (site of Hopewell Indian tribe), Lincoln Home National Historic Site (Abraham Lincoln's Springfield, Illinois home) and Salem Maritime National Historic Site.

Since 1935, Congress has enacted additional laws to directly protect historic sites and properties. *See* National Historic Preservation Act, 16 U.S.C. Sec.'s 470-470w-6, the Archeological Resources Protection Act, 16 U.S.C. Sec.'s 470aa-470ll. Congress has also indirectly provided for historic preservation. In the Maritime Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. Sec.'s 1431-1439, Congress noted the need for historic research in the marine environment and authorized federal agencies to protect historically significant sites as "marine sanctuaries." Pursuant to this law, the Secretary of Commerce created the "Monitor Marine Sanctuary" to protect the remains of the U.S.S. Monitor as it lay on the floor of the Atlantic Ocean and to prohibit any salvage or artifact recovery from this historic vessel. 15 C.F.R. Sec. 924.1-8.

Penn Central Transportation Company v. City of New York, 438 U.S. 104, 107 (1978). When addressing the States' right to enact laws protecting historic properties and sites, the courts have consistently upheld the power of the states. *See Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978); *City of New Orleans v. Duke,* 427 U.S. 297 (1976); *Maher v. City of New Orleans,* 516 F.2d 1051 (5th Cir. 1975); *Belman v. State,* 322 Md. 207, 586 A.2d 1281, 1283 (1991); *Portsmouth Advocates, Inc. v. City of Portsmouth,* 587 A.2d 600, 602 (1991); *A-S-P Associates v. City of Raleigh,* 298 N.C. 207, 258 S.E.2d 444 (1979); *Figarsky v. Historic District Commission,* 171 Conn. 198, 368 A.2d 163 (1976); *Santa Fe v. Gamble-Skogmo,* 73 N.M. 410, 389 P.2d 13 (1964).

B. State Defense of Historic Shipwrecks

Based upon their respective historic preservation laws, the States began to set up programs directly aimed at the preservation of historic shipwrecks found on their submerged lands. This included establishing historic preservation offices in State governments whose sole task was the management of the cultural resources claimed by the State legislatures to be the property of the States. Then in the 1970's began a series of challenges, brought mostly in the federal courts, to the States' right to the title, control and management of these historic shipwrecks. *See, e.g. Cobb Coin, Inc. v. Unidentified, Wreck and Abandoned Sailing Vessel,* 525 F. Supp. 186 (S.D. Fla. 1981) and 549 F. Supp 540 (S.D. Fla. 1982) [Florida state lands]; *Klein v. Unidentified, Wreck and Abandoned Sailing Vessel,* 568 F. Supp. 1562 (S.D. Fla. 1983), *aff'd,* 758 F.2d 1511 (11th Cir. 1985) [Biscayne National Park]; *Maritime Underwater Surveys v. Unidentified, Wreck and Abandoned Sailing Vessel,* 717 F.2d 6 (1st Cir. 1983) [Massachusetts state lands]; *Chance v. Certain Artifacts Found and Salvaged,* 606 F. Supp 801

(S.D. Ga. 1984), *aff'd,* 775 F.2d 302 (11th Cir. 1985) [Georgia state lands]; *People v. Massey,* 137 Mich. App. 480, 358 N.W.2d 615 (1984) [Michigan state lands]. With the exception of the *Cobb Coin* decision, the courts applied the maritime law of finds to the cases and ruled that, since the items were embedded in the land of the State, the historic shipwrecks belonged to the States. What also evolved from these cases was the legal theory that such long lost vessels had long ago been abandoned and that any claimant to the vessel had to prove that such a vessel had not been abandoned.

C. Abandoned Shipwreck Act

To stop further the constant, and fiscally disrupting, lawsuits against the States when they attempted to protect and preserve historic shipwrecks, the States, along with archaeologists and historians, went to Congress to have that body enact legislation settling the matter. The intent of the States was to have Congress vest absolute title in those historic shipwrecks that had long lain in or on their sovereign submerged lands. In order to reach this goal, the States sought to place into law the "embeddedness" exception of the maritime law of finds, making any claimant to a vessel embedded in State lands show that he had not abandoned the vessel.

On April 28, 1988, President Ronald Regan signed into law the Abandoned Shipwreck Act of 1987. Codified at 43 U.S.C. Section 2101 through 2106, the enactment of the ASA was the culmination of the long history of the States' attempt to resolve the issue of title to historic shipwrecks found abandoned on the States' sovereign submerged lands.[5]

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5 Title to the respective State to these submerged lands was confirmed by Congress in the Submerged Lands Act of 1953, 43 U.S.C. *et seq.*

The ASA refashions the respective ownership rights of the States and the Federal government by asserting Federal title to certain abandoned shipwreck[s] that are located within the submerged lands of a State. Under the ASA, the Unites States "asserts title to any abandoned shipwreck that is embedded in submerged lands of a State" or "on submerged lands of a State and is included in or determined eligible for inclusion in the National Register." 43 U.S.C. Section 2105(a). For those shipwrecks located within the territorial jurisdiction of a State, the United States then transfers title of those vessels to that State, 43 U.S.C. Section 2105(c), retaining title to those shipwrecks located in or on public lands of the United States, 43 U.S.C. Section 2105(d).

Then, to alleviate the States of the constant need to have their titles challenged in federal courts, Congress removed these historic shipwrecks from the application of the maritime law of finds and salvage. 43 U.S.C. Section 2106(a). The substantive and deliberate effect of these provisions is to deprive a cause of action for title to the finder of any shipwreck that is covered under the ASA, and to vest jurisdiction over such claims in the state courts. *See, e.g., Zych v. Unidentified, Wrecked and Abandoned Vessel*, 941 F.2d 525 (7th Cir. 1991).

The effect of the ASA is to end nearly all title disputes in historic shipwrecks by placing presumptive, if not absolute, title to historic shipwrecks in the States. The ASA does not contain a definition of "abandonment." Congress, relying upon the then accepted general maritime law meaning of "abandonment," did not require the original owner to actively disclaim title or ownership, permitting abandonment to be inferred or implied under the factual circumstances. *See* H.R. Rep. No. 100-514(I), 100th Cong., 2nd Sess., *reprinted in* 1988 U.S.C.C.A.N. 365, 366. Conversely, Congress did not place as a burden on the States, and Federal Government, the requirement that each claiming

State prove an express disclaimer of abandonment or an abandonment. Like the rulings of the Fifth Circuit in *Treasure Salvors v. Unidentified, Wreck and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) and *Klein v. Unidentified, Wreck and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985), (stating that to believe that the original owner still had an interest in the shipwreck was "absurd"), Congress' passing of title to the States had the express, result of eliminating any need by the States or Federal Government to prove abandonment.

D. The Court Should Take Review to Settle the Definition of an "Abandoned" Shipwreck Which Directly Affects the Rights of the States and Federal Government

The court below erred in determining when a shipwreck has been "abandoned." It held that an abandonment cannot be inferred as a factual matter from all the distinct circumstances surrounding the particular case. Instead, the court below concluded that no shipwreck is ever "abandoned," within the meaning of federal admiralty law, absent "an owner's express declaration abandoning title." Pet. 27a. That unfortunate ruling, which will surely have capricious effects on judicial administration in this area, is also of great immediate concern to the States and the federal government.

The peculiar new definition of "abandonment" provided by the court of appeals' opinion, in direct contravention to the established meaning in maritime law, has a direct and significant effect on the sovereign and proprietary rights of the States and the Federal Government. The ASA developed a brand-new scheme of federal-state relations in the area of preservation of historic shipwrecks, an area of historic preservation never before directly addressed by Congress, that coordinates the legitimate interests in a framework of

cooperative federalism. 43 U.S.C. §§ 2101-2106 (1988). The ASA is designed to harmonize and clarify the sovereign jurisdictional rights of the States and the Federal Government in these unique properties and encourages the States to create or strengthen their programs of historic prservation of these shipwrecks.[6]

Under the ASA, the ownership or assertion of title to any shipwreck property depends entirely on the construction of the term "abandoned," which alone triggers the statute's application. But that key term is nowhere defined in the ASA itself. Instead, the legislative history indicates that the Federal law was constructed upon the accepted definition of "abandonment" developed in federal admiralty law. Indeed, one of the Committee reports expressly notes that "the term 'abandoned' does *not* require the original owner to actively disclaim title or ownership." H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 366. That statement is in direct contravention of the decision below. By contrast, the Report observes that "abandonment or relinquishment of ownership rights may be implied or otherwise inferred." *Id.*

Thus, the main purpose of the ASA will be frustrated if the definition of "abandoned" that the court of appeals codified into law, which fixes its scope and operation, remains subject to continuing uncertainty and disagreement in different venues. As the Report of the House Committee on Interior and Insular Affairs described the background that gave rise to the Act:

> There is currently confusion over the ownership and authority to manage abandoned shipwrecks. States have claimed title to, and regulatory authority over, abandoned historic shipwrecks

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6 *See Abandoned Shipwreck Act Guidelines,* 55 Fed. Reg. 50166, 50122-50125 (1990).

> located on submerged lands under their jurisdiction. The Federal Admiralty Courts have also claimed jurisdiction over the salvage of these resources....
>
> Twenty-seven states have passed legislation concerning historic shipwrecks. Recent court cases have put in question the validity of these various laws.

H.R. Rep. No. 514(I) at 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 366. The decision below is out of step with the ASA and will inevitably recreate all the problems that Congress sought to address in the enactment of the ASA.

The same concerns are amplified in a later report issued by a different House Committee, the Committee on Merchant Marine and Fisheries, on this same legislation:

> The central issue intended to be resolved by the legislation is the ownership and the authority to manage certain abandoned shipwrecks on State lands....
>
> States have been constrained in applying their shipwreck management and preservation laws because of conflicts with federal admiralty principles and mixed judicial decisions....
>
> At a minimum, these decisions have led to confusion over the ownership of, and responsibility for, historic shipwrecks in State waters. This confusion led to the introduction of historic shipwreck legislation in the 97th Congress....

H.R. Rep. No. 514(II), 100th Cong., 2d Sess. 2-3, *reprinted in* 1988 U.S.C.C.A.N. 365, 370-71. Again, if Congress believed it would clear up the confusion surrounding "ownership and the authority to manage abandoned shipwrecks"

by passing the ASA, then the decision below substantially nullifies the salutary effect of that legislation.

Thus, the effect of the decision of the Fourth Circuit Court of Appeals particularly will be to reverse the underlying presumption of the ASA granting title in the States, foster uncertainty in the title of these vessel, again subject the States to lengthy and expensive litigation to quiet title in these vessels, and possibly subject the States, and the United States, to claims by insurance companies of inverse condemnation of historic shipwrecks that have been claimed by the States or made into State parks.

If the Court of Appeals' requirement that abandonment can, in essence, only exist by "an owner's express declaration abandoning title" becomes the law of the land, the States will be in a precarious position. Will the States, which so far have gone to a great deal of public expense to preserve historic shipwrecks and even created state parks around some of these historic shipwrecks,[7] continue to spend today's scarce public dollars if they were uncertain if some unknown claimant may lay claim to a State-protected shipwreck? What right will the States have to prevent such a claimant from excavating a shipwreck if such excavation will cause environmental harm or be a disturbance to other commercial activity? Will the States be subject to inverse condemnation actions if the States desire to protect the vessel and the "owner" wishes to remove it? Finally, will the States be

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7 The creation of such parks and preserves by the States has been directly addressed by the National Parks Service in the *Abandoned Shipwreck Act Guidelines*, 55 Fed. Reg. at 50137-50138. For example, Florida has created three such parks and is working on the creation of a fourth (i.e. Urca de Lima Underwater Archaeological Preserve [Appendix B1], City of Hawkinsville Underwater Archaeological Preserve [Appendix B2]), North Carolina has one (USS HURON Historic Shipwreck Preserve [Appendix B3]), and New Hampshire has created four (i.e. The "PHOENIX" Underwater Historic Preserve [Appendix B4]). See also Appendix C, a listing of public and private museums specializing in maritime history.

required to initiate "quiet title" cases in court to force the "owner" to set forward to claim the vessel?

The ASA, by recognizing the past practices and decisions of the First, Fifth and Eleventh Circuit Courts of Appeals, brought to the States the stability and certainty necessary for the States to proceed with the expenditure of public funds for the protection of historic shipwrecks. To lose that certainty and place the States in a position of not knowing "if" an "owner" still exists will result in the halting of most of the now on-going State historic shipwreck protection programs.

All of these careful changes in substantive and jurisdictional law mapped out by Congress in the ASA are undercut as long as confusion remains over the proper definition of the term "abandoned." The ability of the States to fulfill the role envisioned in this constructive exercise in cooperative federalism is hamstrung by this initial obscurity, *in each instance*, about whether ownership and authority over a shipwreck is governed by the definition contemplated in the ASA or instead by further unpredictable manipulation of the law of admiralty in the federal courts. That issue has important practical consequences and should be resolved.

II. THE COURT HAS CONSTITUTIONAL RESPONSIBILITIES AS TO CASES IMPINGING ON THE UNIFORMITY OF ADMIRALTY LAW AND ON THE INTERSTICES OF FEDERAL AND STATE APPLICATION OF THE GENERAL MARITIME LAW

The Abandoned Shipwreck Act of 1987 was passed, in part, to remove a grave conflict between the Article III admiralty jurisdiction of the federal judiciary, and the claims of the States to management and ownership of long-lost

and abandoned shipwrecks in state coastal and territorial waters. *See, e.g., Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). The conflict had created a repeated series of conflicts reaching constitutional dimensions, implicating the interplay between the Eleventh Amendment immunities of the States and the admiralty jurisdiction of the federal courts. *See, e.g., Zych v. Unidentified, Wrecked and Abandoned Vessel; Maritime Underwater Surveys v. Unidentified, Wrecked and Abandoned Sailing Vessel, supra; Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 691 F. Supp. 1377 (S.D. Fla. 1988). *See also* Herbert R. Baer, *Admiralty Law of the Supreme Court* § 33-1 (3d ed. Supp. 1985). Congress and the President were determined to remove the tension, by removing the category of abandoned historic shipwrecks from the scope of the dispute between powers of the States and of admiralty jurisdiction.

The Court's attention is particularly warranted by the scope of the decision below in defining the substantive rules of admiralty law regarding abandonment of long-lost historic shipwrecks and other items that have remained, untouched, on the seabed floor for many decades. As this Court has pointed out:

> Article III of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and, since that time, Congress has left to this Court the responsibility for fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so.

Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963). *See also S.W. Sugar & Molasses Co. v. River Term. Corp.*, 360 U.S. 411, 415 (1959) ("The issue is one of importance in

the development of the law maritime, as to which we have large responsibilities, constitutionally conferred....")

The Court's constitutional responsibilities are made all the more significant where, as here, the implications of the decision may substantially affect a federal statute and the uniformity of the general maritime law, or otherwise impinges on the interstices of federal and state application of the general maritime law in light of the Abandoned Shipwreck Act of 1987. *See generally Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371; *reh'g denied,* 359 U.S. 962 (1959).

III. AT THE VERY LEAST, THE COURT SHOULD NOT DECLINE REVIEW OF THIS CASE WITHOUT FIRST SOLICITING THE VIEWS OF THE UNITED STATES GOVERNMENT ABOUT THE EFFECT OF THE DECISION BELOW ON THE ABANDONED SHIPWRECK ACT OF 1987 AND THE UNITED STATES

For the reasons stated above, the Court should grant review to remove the practical difficulties of inconsistent decisions affecting the application of the ASA. The disagreement over how to identify an "abandoned" shipwreck totally undermines the efficacy of the Federal law, and leaves the States unable to be certain when they may exert ownership over such property. But the problems thus raised are not confined to the States; they will have detrimental effects on the United States as well.

As stated in 43 U.S.C. 2105(d), Congress retained for the United States title to those historic abandoned shipwrecks that lay in or on the public lands of the United States (i.e., National Parks, National Marine Sancutaries and National Seashores). Historic shipwrecks have been located on these

public lands (i.e., Isle Royale National Park, Biscayne National Park [*Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 758 F.2d 1511 (11th Cir. 1985)], Florida Keys National Marine Sanctuary [*United States v. Fisher*, USDC, S.D. Fla. Case No. 92-10027-CIV] and Cape Canaveral National Seashore [*Lathrop v. Unidentified, Wrecked and Abandoned Sailing Vessel,* U.S.D.C. Md. Fla., Case No. 88-37-CIV-ORL]).

At the very least, therefore, if the Court is uncertain about whether to grant review in this case, the States strongly urge the Court to solicit the views of the United States Government. As noted above, the decision below has imparted an unusual and unjustified reading to a key term in a Federal statute, thus, having an effect on the United States' claim of ownership of historic shipwrecks located on public lands. The operation of the statute is extended by authorization for the National Park Service to issue guidelines to the States "for the comprehensive management of underwater resources related to historic shipwrecks." 43 U.S.C. § 2104. Any management program of the National Park Service or guidelines it issues will be affected by the decision below. In addition, the Federal Government stands in the shoes of the States, and must confront all the same perplexities, insofar as it is charged with responsibility for territorial government over such maritime possessions as Puerto Rico, Guam, the Virgin Islands, and others, each of which is defined as a "State" within the meaning of this statute. § 2102(e), (f).

For these reasons, the State Attorneys General respectfully urge the Court not to deny review of this case without at least calling for the views of the Solicitor General about whether the central legal issue warrants review as it affects the United States Government.

IV. CASES INVOLVING FEDERAL STATUTORY EFFORTS TO ACHIEVE COOPERATIVE FEDERALISM WITH AND AMONG THE STATES ARE ESPECIALLY IMPORTANT IN WARRANTING THIS COURT'S REVIEW

Finally, the decision below theatens a Congressional framework created to facilitate State and Federal protection and preservation of historic abandoned shipwrecks. The dispute here over the meaning of the term "abandonment," which is of immediate importance to the States and the Federal Government, thus has a special claim to this Court's attention because it implicates potential disputes not simply among individuals, but over the very concept of governmental protection of sunken historic shipwrecks. This Court has a special role in resolving such conflicts as the only practical alternative to a collision by force. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (Holmes, J.).

The Court has recognized the special importance of similar controversies under the Submerged Lands Act, 43 U.S.C. §§ 1301-1356 (1988) (hereinafter "SLA"). The SLA is the forerunner to the Abandoned Shipwreck Act, establishing as it did a cooperative framework for settling State ownership over natural resources and submerged lands located nearest their shores. The ASA builds upon and extends the principles of the Submerged Lands Act beyond their original context to "non-natural objects such as shipwrecks that rested on or within submerged lands." H.R. Rep. No. 514(II) at 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 370.

The Court has resolved numerous cases involving the Submerged Lands Act, thus putting to rest disputes that may be thought to raise potential clashes among sovereign powers. *See, e.g., United States v. Louisiana*, 470 U.S. 93 (1985); *United States v. Maine*, 469 U.S. 504 (1985); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273

(1982); *United States v. Florida*, 425 U.S. 791 (1976). Many cases involving submerged lands were not direct controversies between sovereign entities within the Court's original jurisdiction, yet raised questions of that character significant enough to warrant review. *See, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352 (1969). The importance of the issues raised for the State and Federal governments is thus established by the Court's frequent interventions in this area.

Similarly here, where the very framework of a Federal statute balancing the jurisdiction of the State and Federal Governments under federal law is threatened by a disuniformity of lower court decisions, review by this Court is warranted. The importance of the matter is not reduced because man-made artifacts are at stake rather than natural resources, since the value of these long-lost materials may often be even greater, as is true in this case. In any event, the importance of the legal issues, and the central need to resolve and clarify the uniform application of the Federal law and its framework of title, propetction and procedure, is the same under each statute.

CONCLUSION

Because the Court of Appeals' decision will have unintended results on the States and because that decision conflicts with decisions of other circuits, this Court should grant the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 92-1189

IN THE

Supreme Court of the United States

October Term, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al,*
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTORARI

APPENDICES

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APPENDIX A

STATE HISTORIC PRESERVATION LAWS

The following is a compilation of state and territorial laws concerning the claiming the of title to and preservation of sites, properties, objects and artifacts having cultural, historic or archeological value. Many of these laws expressly claim title to "underwater" historic site and artifacts without expressly stating historic shipwrecks. THOSE STATE AND TERRITORIAL LAWS THAT SPECIFICALLY CLAIM TITLE TO AND/OR PROTECT AND PRESERVE HISTORIC SHIPWRECKS ARE DENOTED BY THE ADDITION OF AN (*) AT THE STATE LAW CITATION.

STATES:

ALABAMA:	ALA. CODE Sec. 41-3-1 through Sec. 41-3-6 (1982) and (*)Sec. 41-9-249.1 (1982)
ALASKA:	ALASKA STAT. Sec. 41.35 *et seq.* (1988)
ARIZONA:	ARIZ. REV. STAT. Sec. 41-841 thru Sec. 41-847 (1988) ((*)Sec.41-841)
ARKANSAS:	ARK. STAT. ANN. Sec. 13-6-301, *et seq.* and Sec. 13-7-101, *et seq.* (1987)
CALIFORNIA:	CAL. PUB. RES. CODE Sec. 5097 *et seq.* (*)Sec. 6309, (*)Sec. 6313 and (*)Sec. 6314 (West 1991 Supp.)
COLORADO:	COLO. REV. STAT. Sec. 24-80-401 thru Sec. 24-80 410 (1988)
CONNECTICUT:	CONN. GEN. STAT. ANN. Sec. 10-381 *et seq.* (West 1991 Supp.)

DELAWARE:	DEL. CODE ANN, tit. 7, Sec. 5301 *et seq.* and tit. 29, 551 *et seq.* (1989)
FLORIDA:	FLA. STAT. Sec. 267.061 thru Sec. 267.152 (1989) ((*)267.061(b)
GEORGIA:	GA. CODE ANN. Sec. 12-3-52 thru Sec. 12-3-54 and (*)Sec. 12-3-80 thru (*)Sec. 12-3-83 (1988)
HAWAII:	HAWAII REV, STAT. Sec. 6E-1 thru Sec. 6E-15 (1985)
IDAHO:	IDAHO CODE Sec. 67-4113 thru Sec. 67-4122 (1989)
INDIANA:	IND. CODE (*) Sec. 14-3-3.3-1 thru Sec. 14-3.3-18 and Sec. 14-3-3.4-1 through 14-3-3.4-20 (1990)
KANSAS:	KAN. STAT. ANN. Sec. 75-2715 thru Sec. 75-2726 (1989)
KENTUCKY:	KY. REV. STAT. ANN. Sec. 166.705 thru Sec 164.735 (Michie 1987)
LOUISIANA:	LA. STAT. ANN., R.S. 41:1601 through Sec. 41:1614 (1990) ((*)Sec. 41:1605)
MAINE:	ME. REV. STAT. ANN. tit. 27, Sec. 371 - Sec. 378 (1988)
MARYLAND:	MD. HOUS. & DEV. CODE ANN. ART.83B, (*) Sec. 5-601 *et seq.* (1991 Supp.)
MASSACHUSETTS:	MASS. GEN. LAWS ANN. (*) ch. 6, 179-180; ch. 9, 26A-C; ch. 9, 27-27C; and ch. 91, 63 (1986)

MICHIGAN:	MICH. COMP. LAWS (*) Sec. 299.51 - Sec. 54, ch. 399 ((*) Sec. 399.301-399.410) (1991 Supp.)
MINNESOTA:	MINN. STAT. Sec. 138.31 - Sec. 138.42 and 138.51 *et seq.;* ch. 116 (1990)
MISSISSIPPI:	MISS. CODE ANN. 39-7-1 *et seq.*, (*)Sec. 39-7-3 and (*)Sec. 39-7-9 (1990)
MONTANA:	MONT. CODE ANN. Sec. 22-3-421 thru Sec. 22-3-442 (1990)
NEVADA:	NEV. REV. STAT. Sec. 381.195 thru Sec. 381.227 (1986)
NEW HAMPSHIRE:	N.H. REV. STAT. ANN. ch. 227-C (1989)
NEW JERSEY:	N.J. ADMIN. CODE 7:7E-3.18 (1991)
NEW MEXICO:	N.M. STAT. ANN. Sec. 18-6-1 thru Sec. 18-6-17 (1991)
NEW YORK:	N.Y. PARKS AND RECREATION LAW 14.01 *et seq.* (McKinney 1984)
NORTH CAROLINA:	N.C. GEN. STAT. Sec. 70-10 thru Sec. 70-20; and (*) Sec. 121-22 *et seq.* (1991)
NORTH DAKOTA:	N.D. CENT. CODE ch.'s 55-02, 55-02.1, 55-03, 55-10, 55-02-07, 55-03-01, 55-10-02, 55-10-08 and 55-10-10 (1978)
OHIO:	OHIO REV CODE ANN. Sec. 149.51 *et seq.* (Page 1990)

OKLAHOMA:	OKLA. STAT. tit. 53, Sec. 1.1 *et seq.* and Sec. 361 (1991)
OREGON:	OR. REV. STAT. Sec. 358.905 thru Sec. 358.955 and 390.235 (1987)
PENNSYLVANIA:	PA. STAT. ANN. tit 37, Sec. 101 - Sec. 104 and Sec. 701 - Sec. 705 (Brig NIAGARA) (Purdon 1991 Supp.)
RHODE ISLAND:	R.I. GEN. LAWS Sec. 42-45.1 - Sec. 42-45.1-13 ((*)Sec. 42-45.1-4) (1988)
SOUTH CARLOINA:	S.C. CODE ANN. (*)Sec. 54-7-400 thru (*)Sec. 54-7-500 (1990 Supp.)
SOUTH DAKOTA:	S.D. CODIFIED LAWS ANN. ch.'s 1-19A, 1-19B and 1-20 (1985)
TENNESSEE:	TENN. CODE ANN. Sec. 11-6-101 thru Sec. 11-6-119 (1991 Supp.)
TEXAS:	TEX. NAT. RES. CODE ANN. (*) ch. 191 (Vernon 1978)
UTAH:	UTAH CODE ANN. Sec. 63-18-18 thru Sec. 63-31 (1989)
VERMONT:	VT. STAT. ANN. tit. 22, Sec. 701 *et seq.* (1987)
VIRGINIA:	VA. CODE Sec. 10.1-2200 thru 10.1-2404 (*) 10.1-2214 (1989)
WASHINGTON:	WASH. REV. CODE ch. 27.53 (1982) and (*) Sec. 27.53.045 (1991 Supp.)
WEST VIRGINIA:	W.VA. CODE 29-1-8b (1991 Supp.)
WISCONSIN:	WIS. STAT. ANN. Sec. 44.47 (West 1990)

WYOMING:	WYO. STAT. Sec. 36-1-114 thru Sec. 36-1-116 (1977)
TERRITORIES:	
GUAM:	GUAM GOV'T CODE Sec. 13985 *et seq.* (1990)
PUERTO RICO:	P.R. LAWS ANN. tit. 23, 161-186 (1987)
NORTHERN MARIANA ISLANDS:	P.L. No. 2-7, tit. 2, CMC Section 1100 *et seq.* (1990)

APPENDIX B

Urca de Lima

UNDERWATER ARCHAEOLOGICAL PRESERVE

FLORIDA DEPARTMENT OF STATE
Jim Smith, Secretary of State
Division of Historical Resources
Bureau of Archaeological Research

Placing replica cannons on the site. Left to right: Pete DuBus and Herman Summerlin, Seven Seas Construction Company; Claude Davis, St. Lucie County Historical Commission; Tom Gore, Florida Department of State; Glen Brough, Seven Seas Construction Company.

Urca de Lima

She was built strong, heavily planked to ride through ocean swells. *Urca de Lima* (named after her owner Miguel de Lima y Melo), was part of a Spanish merchant convoy commanded by *Capitan General* Don Juan de Ubilla. She was also known as the *Nao de Refuerzo*, perhaps because she had been reinforced for the Atlantic trade routes. *Urcas* were flat-bottomed, round-bellied storeships originally designed to ply the shallow waters off the Flemish coast. Due to their cargo carrying capacity, they soon were adopted for the Spanish-American trade between Europe and the New World.

Loaded with the products of Mexico and Manila, Ubilla's *flota* of ships rendezvoused in the summer of 1715 with the South American squadron of Antonio de Echeverz at Havana to begin the long voyage back to Spain. The combined fleet of eleven vessels set sail from Cuba on the 24th of July, assisted in their northerly course through the *Canal de Bahama* by the Gulf Stream. But they were never to reach the open ocean.

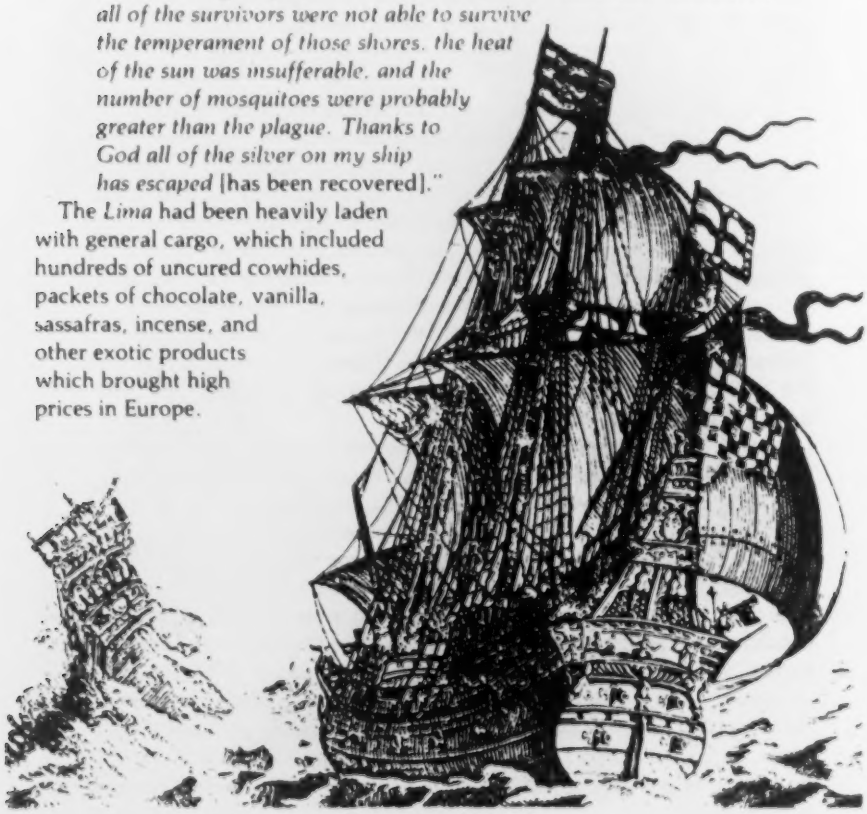
Only a few days out, the *flota* was struck by a fierce hurricane off the coast of Florida. Miguel de Lima later described what happened:

> *"The sun disappeared and the wind increased in velocity coming from the east and east northeast. The seas became very giant in size, the wind continued blowing us toward shore, pushing us into shallow water. It soon happened that we were unable to use any sail at all, making bare our yards, mostly due to the wind carrying away our sails and rigging, and we were at the mercy of the wind and water, always driven closer to shore. Having then lost all of our masts, all of the ships were wrecked on the shore, and with the exception of mine, broke to pieces. We lost only thirty seamen and marines, who were carried away by waves while in the waist of the ship. My ship is at Palmar de Ays in 27 degrees and 15 minutes at the mouth of a river."*

Grounded by the storm, but left relatively intact, *Urca de Lima* provided survivors from the other wrecked ships with victuals from her stores until supplies finally arrived from Havana thirty-one days later. In the meantime, the castaways began to bury their dead and collect what valuables they could from debris washed ashore.

> *"On these deserted beaches, which were very barren and dry, God permitted us to find sweet water, enough to drink, by making wells the height of a man, which were called "casimbas." However, all of the survivors were not able to survive the temperament of those shores, the heat of the sun was insufferable, and the number of mosquitoes were probably greater than the plague. Thanks to God all of the silver on my ship has escaped* [has been recovered]."

The *Lima* had been heavily laden with general cargo, which included hundreds of uncured cowhides, packets of chocolate, vanilla, sassafras, incense, and other exotic products which brought high prices in Europe.



Unlike other ships in the stricken *flota*, she carried no royal treasure, only private silver in sacks and chests. It was probably her stout hull that had saved much of her contents from being dashed away in the storm. She was the first of the fleet wrecks to be salvaged by Spanish crews from Havana, but was then burned to the waterline to conceal her position from English freebooters, who also began to arrive at the scene. Although many precious goods were recovered from the wrecksites shortly after the disaster, salvage attempts soon ended as turbid sand engulfed the remnants of the lost ships and their cargos.

Some fifty years later marine surveyor Bernard Romans was sent to Florida to map the little-known coastline for the British Crown. When he reached the beaches of "Palmar de Ais," his survey crew found the remains of an old shipwreck inshore of the shifting sand bars at the mouth of an inlet. It was the *Urca de Lima*. The men collected Spanish coins on the beach and lived on turtle eggs and bear meat as they completed mapping the region.

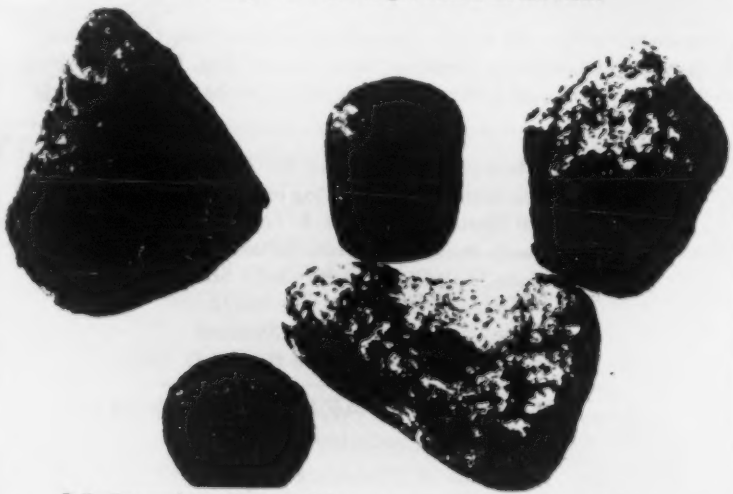
Reports from the coast between Sebastian and Ft. Pierce inlets in the early 1800s indicate that the ships of the 1715 fleet were known to have been lost in that area. However, in 1837 John L. Williams published the *Territory of Florida*, a book that gained widespread popularity but mistakenly placed the location of the 1715 wrecks in the Florida Keys—an error that would continue on "treasure" maps published as late as the 1960s. By 1892 the original inlet at Ft. Pierce had filled with sediment and had become part of the present beach. The wreck of the *Urca de Lima* once again was forgotten.

Then, in 1928 an adventurer named William J. Beach arrived in Ft. Pierce with tales of man-eating sharks and Spanish gold. Equipped with hard-hat diving gear and a metal detecting device, he led city officials to the ballast pile of the *Urca de Lima*, the first of the fabled 1715 fleet shipwrecks to be rediscovered. As many as sixteen cannons and four anchors were raised from the wrecksite, some of which can still be seen today in front of the Ft. Pierce City Hall. Word of the wreckage spread, and in 1932 the first salvage permit was issued to search for and to recover Spanish treasure. But it was not until 1951 that a Captain Steadman A. Parker announced that he had located the flagship and other wrecks from the 1715 fleet, and managed to secure three salvage leases between 1950 and 1952 to work on them.

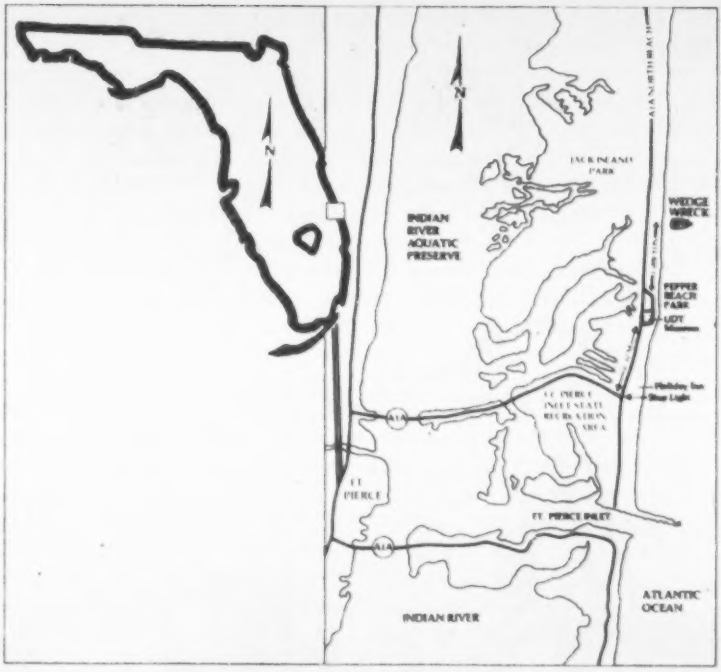
In 1955 Jack Carr and Silas Thomas received a salvage permit on the *Urca de Lima*. Since most of her cargo had been recovered by the Spaniards, modern salvage efforts were only marginally successful, producing only one silver bar, two silver wedges and five iron cannons. The silver wedges gave rise to the site's modern name, the Wedge Wreck. In 1959 Kip Wagner and "Doc" Kelso formed a company which they named Real Eight, after the "pieces of eight" they had found in the sand south of Sebastian Inlet. Under contract with the State of Florida, work began in earnest on the 1715 wrecksites. The first years of salvage (1960-1962) saw continued work on the *Urca de Lima*; however, more productive sites soon captured the salvors' attentions, and the *Lima* was once again left alone. In 1983 and 1984 the last salvage licenses were granted on the *Urca de Lima*, and in 1985 her surviving hull structure was carefully mapped and recorded.

"Part of the Province of East Florida." Bernard Romans, 1774. At the River St. Sebastian Roman notes "Opposite this River perished the Admiral commanding the Plate Fleet 1716, the rest of the Fleet 14 in number, between this and Bleech Yard."

Cannons salvaged from the Wedge Wreck in the late 1920s.



Bulk silver wedges and pieces of the type recovered from the *Urca de Lima*



How to find the

Urca de Lima

Follow Highway A1A north from the Ft. Pierce Inlet to Pepper Park. Walk northward along the beach approximately 1,000 yards from the park boundary. The wrecksite lies on the first offshore reef in 10-15 feet of water, some 200 yards from shore.

Please anchor only at the marker buoy to avoid disturbing the remains of the ship, and remember to display a "divers down" flag. No spear fishing is allowed within a 100-foot radius of the site.

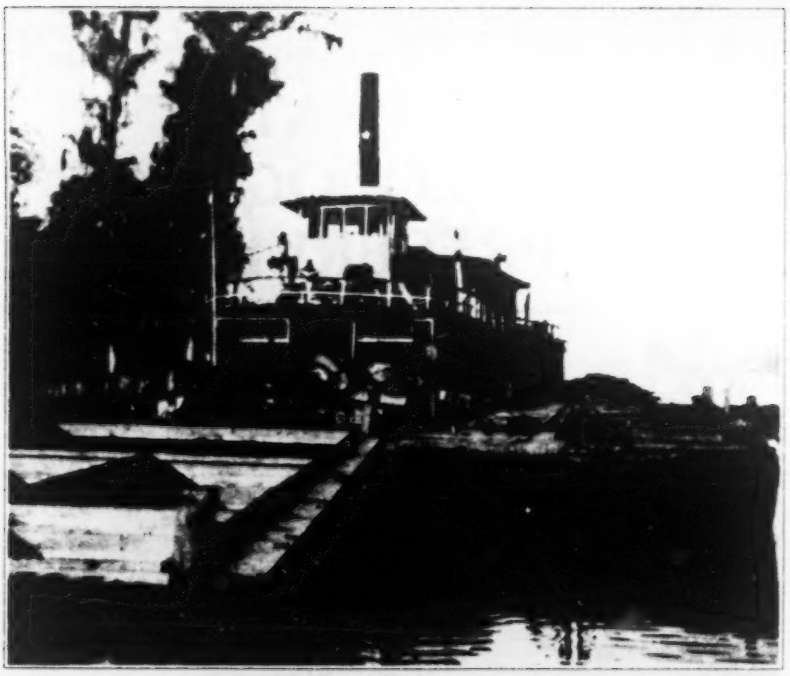
Interpretive displays of materials from the 1715 treasure fleet can be seen at the following locations:
Museum of Florida History (R.A. Gray Building, 500 South Bronough Street, Tallahassee).
McLarty State Museum (Sebastian Inlet State Park, one mile south of Sebastian Inlet).
St. Lucie County Historical Museum (under the east end of Peter P. Cobb Bridge, Ft. Pierce).

FLORIDA DEPARTMENT OF STATE
Jim Smith, Secretary of State
Division of Historical Resources
Bureau of Archaeological Research

APPENDIX B2

CITY OF HAWKINSVILLE
UNDERWATER ARCHAEOLOGICAL PRESERVE

A Joint Project of
FLORIDA DEPARTMENT OF STATE
Jim Smith, Secretary of State
Division of Historical Resources
and
FLORIDA DEPARTMENT OF NATURAL RESOURCES
Division of Recreation and Parks
and
GULF MARINE FOUNDATION, INC.



THE SUWANNEE RIVER

When Stephen Foster's song "Old Folks at Home" was published in 1851, the Suwannee River became immortalized in the hearts of the American people. Even today, Foster's composition still conjures images of this picturesque Florida river bordered by myriad transparent springs and overhanging trees laden with Spanish moss. We can imagine a steamboat making its way downriver during slow-paced days of simple but dependable machinery and the sound of hissing steam and splashing water. A boy and his dog sit under the shade of an oak tree. Echoes of summertime crickets in the shimmering heat are interrupted by a shrill whistle burst as the boat glides into view around the bend. As it passes by, the steam-belching machine rouses a sleeping alligator, which retreats from a sand bar into the cool upwelling depths. The swishing paddlewheels disappear downriver and the crickets resume their symphony.

The evening sunset is overtaken by moonlight, as the boat's unhurried progress carries it through the night. By noon of the next day, the mouth of the river opens into the Gulf of Mexico, flat as glass. As the captain steers south-southwest towards the Cedar Keys, the smell and heat of wood burning under the covered boiler room is noticeable in the calm. The breathless offshore expanse is only broken by distant thunderheads, which promise to break the heat, but may also anger the sea. These images of a steamboat become almost palpable before they evaporate, and we come back into the reality of our own time and place. But they are as much a part of Suwannee River heritage as is Stephen Foster's song.

The Suwannee's unique beauty beckons us to follow its flow downriver, and to allow our imagination to merge with its cool currents. While times have changed along the river banks, relics of the Suwannee's past still survive, hidden below the water's surface.

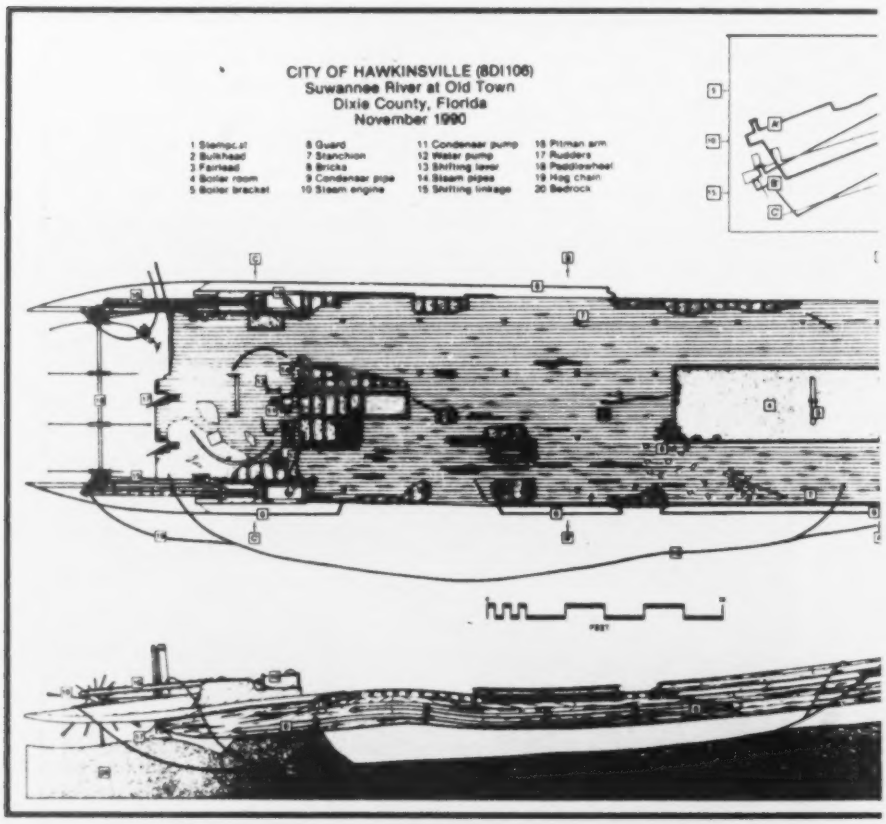
THE SUWANNEE RIVER

From the 17th century onwards, the Suwannee River played an important role in the development of central Florida. Waterborne transport helped to supply the needs of Spanish, British, and Americans. By 1834, an unnamed steamboat was said to be stationed at St. Mark's "for Suwaney" trade.

During the Second Seminole War, the steamer *American* unsuccessfully attempted to chase down a canoe full of Seminoles; the race ended only after the canoe overturned in the swift water of a rocky shoal. Traffic on the river during the war years, 1835 to 1843, centered along the lower river, mostly below present-day Branford. After the Second Seminole War, the need to navigate much farther up river was created by cotton growers around settlements such as the town of Columbus (near present-day Suwannee River State Park). The typical Suwannee River route included a stop at Cedar Keys to allow the shallow draft coastal and river-going craft to dock alongside oceangoing vessels and exchange cargos.

At first the Suwannee settlements mainly were serviced by small sailing vessels but by October 25, 1845, the *St. Augustine News* reported that "it has been in contemplation for some time past to establish a mail route, by steamers, upon the Suwannee from Cedar Keys to Fort White, to be connected thence with the St. Johns by stage . . . The steamboat *Orpheus* has arrived and taken her station on the route. We learned that she is a most beautiful vessel, 136 ft. in length, and is fitted up in fine style with 18 state-rooms. She will carry the U.S. Mail from Cedar Keys up the Suwannee to the flourishing town of Columbus."

Along the upper Suwannee, steamers steered through dangerous rocky shoals to reach Columbus, an area of the river today known for swift water canoeing. In 1847, *Orpheus* was lost at an unspecified location in the river, possibly due to a navigational error on rock shoals. However, by the 1850s, Captain Tucker, owner of the steamer *Madison*, went farther upriver to White Springs, in a successful attempt to have the Suwannee River declared navigable above Columbus.

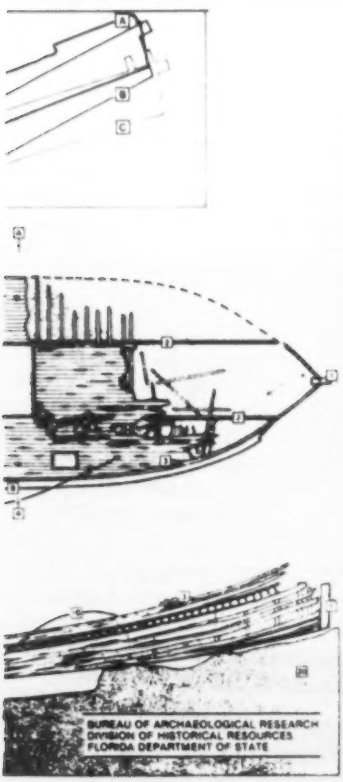


STEAMBOATING ERA

During the Civil War, the port at Cedar Keys fell into Union hands, forcing blockade runners to come into the shallow water approaches of coastal rivers including the Suwannee. As the war dragged on, *Madison* was scuttled in Troy Spring to keep her from falling into Yankee hands and at least two Confederate oceangoing steamers were lost near the mouth of the Suwannee. After the war, there were no known steamboats on the river until the Spring of 1872, when the steamer *Wawenock* began running from New Troy (near Troy Spring) to Cedar Keys.

For the next two decades, steamboating flourished; tourist writer George Barbour noted in 1882 that "the Suwannee River is navigable for small steamboats to the crossing of the Jacksonville, Pensacola and Mobile Railroad (at present-day Suwannee River State Park), and for large steamers to Rowland's Bluff. In the mid-1880s, Captain Bob Ivey moved to Rowland's Bluff, renamed it Branford, and established a steamboat landing adjacent to a new rail line, which ran along the river's bank. By 1888, Ivey also had established a boatyard for the construction of a variety of watercraft, including steamboats, the most famous of which was the *Belle of Suwannee*, a popular honeymoon cruise boat.

The hurricane of 1896 damaged shipping at Cedar Keys, causing the Suwannee steamboat tourist trade to decline. But commercial trade continued to flourish with the growing export of local lumber for general construction, and especially cedar for pencil-making. Gradually, railroads began to replace waterborne transport; but, for almost a hundred years, from 1834 until the 1920s, more than 50 steamboats ran the Suwannee River. Today, the remains of perhaps a dozen steamboats can be found along the river's bottom.



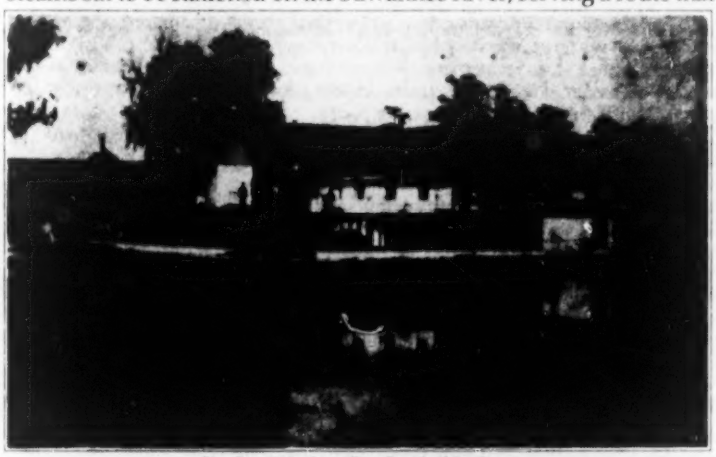
THE VIEW FROM DOWN UNDER

Today, the City of Hawkinsville looks like a story-book ghost ship, lying in shallow water on the west bank of the river south of the railroad trestle at Old Town. The hull of the sunken steamer is virtually intact with her bow pointing upriver. From the stempost, one can swim along the entire deck of the vessel to her stern paddlewheel, exploring numerous deck fittings and steam machinery along the way. Inside darkened hatches, mudfish and catfish make their homes.

Tilting at an angle of 20 degrees to starboard, the steamboat rests on a series of limestone rocks that support the hull above the river bed. The port side of the vessel is partially buried in the river bank. Although the boat's steam boiler has been removed, most of the steam piping remains in place. The main propulsion system, consisting of two enormous horizontal piston engines, each of which drove a long Pitman arm connected to the paddlewheel, is easily recognizable along with its rods and gears. Perhaps the most dramatic features of the wreckage are the four iron sprockets and their wooden spokes that comprised the large paddlewheel that pushed the Hawkinsville up and down the Suwannee.

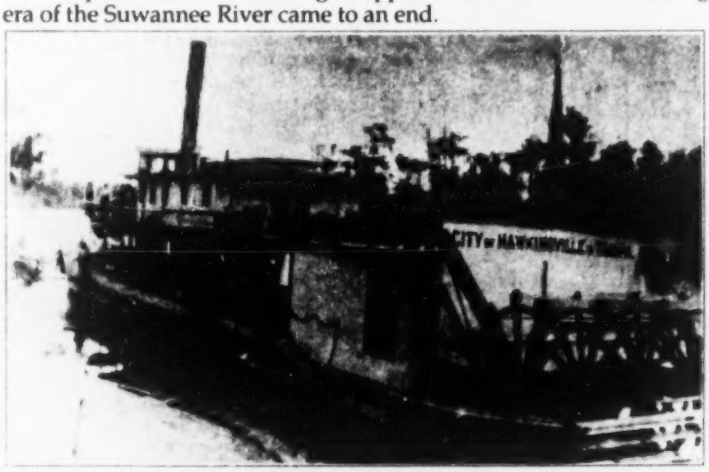
THE *CITY OF HAWKINSVILLE*

The *City of Hawkinsville* is a surprisingly intact survivor of late 19th-century coastal steamboat technology. She was the largest and the last steamboat to be stationed on the Suwannee River, serving a route that



The *City of Hawkinsville* at Branford Station.

included Branford, Clay's Landing, Old Town, and Cedar Keys. Originally built at Abbeville, Georgia in 1896, for the Hawkinsville (Georgia) Deepwater Boat Lines, she was sold in June 1900 to the Gulf Transportation Company of Tampa for use on the Suwannee River. The *City of Hawkinsville* was 141 ft. long, with two decks, a single smoke stack, a square stern, and a molded bow. She was a post-hurricane newcomer, brought into the river to assist a booming lumber industry. Local accounts contend that *City of Hawkinsville* also was instrumental in the construction of the rail bridge at Old Town. In doing so, she quickened her own demise, since the moving of people and goods by rail eventually rendered steamboats obsolete. Although accounts of her last days vary, official registry records indicate that she was in service until May 19, 1922, when her last captain, Mr. Currie, abandoned the vessel and the occupation that could no longer support him. Thus, the steamboating era of the Suwannee River came to an end.



HOW TO FIND THE *CITY OF HAWKINSVILLE*

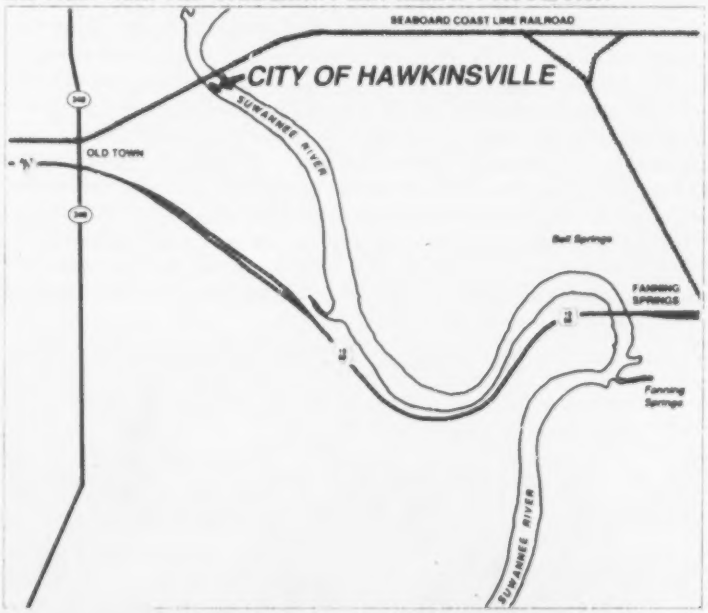
The Hawkinsville is located in shallow water on the western (Dixie County) bank of the Suwannee River, about 100 yards south of the railroad trestle at Old Town. Acces s to the site is by boat only.

The Hawkinsville is marked by a series of buoys on her starboard side, and by mooring bouys approximately 50 feet downstream from her stern. Visitors are asked to tie up to the mooring bouys to prevent anchor damage to the site, and to display a "divers down" flag. Boats are not allowed over the structure of the Hawkinsville shoreward of the marker bouys.

Divers should have advanced open water training before attempting to dive in this dynamic river environment which can change in depth, current velocity and visibility depending on rainfall and runoff. Diving the steamboat is not recommended for novices, or those uncomfortable with limited underwater visibility. Do not dive into or under the hull. Caution should be taken to avoid sharp edges, rough surfaces and stray fishing lines that can be encountered on the wreck. The minimum recommended equipment for a safe dive includes: (1) Full open water SCUBA equipment; (2) Knife; (3) Gloves; and (4) Underwater lights.

Diving should not be attempted on the Hawkinsville when the river is above 4 feet on the gauge at nearby Wilcox Station in Fanning Springs, or if water visibility is less than 3 feet. For information on the river's elevation, call the Suwannee River Water Managment District weekdays at 1-800-226-1066 to ask for the latest river gauge reading at Wilcox Station. Local dive shops can provide information on diving conditions.

The City of Hawkinsville is a well preserved, but fragile piece of Florida's history. Please respect the Underwater Preserve, and leave the site as you found it for others to enjoy. Vandalism should be reported by calling the Florida Game and Fresh Water Fish Commission's alert number 1-800-342-8105.



FLORIDA DEPARTMENT OF STATE
Division of Historical Resources
Bureau of Archaeological Research
R.A. Gray Building
Tallahassee, Florida 32399-0250

APPENDIX B3

THE USS *HURON*

Built a decade after the Civil War, the USS *Huron* was constructed during a period of transition between the old and new navy. The *Huron* and her two sister-ships were the last American naval vessels to be built of iron rather than steel and to be equipped with sails to supplement the ship's steam engine.

During her brief career (1875-1879), the *Huron* visited ports in Mexico, Venezuela, Columbia, Key West, Mobile, Charleston, Norfolk, Washington D.C., Boston, and New York. However, it was the tragedy of the *Huron's* sinking on November 24, 1877 that brought the ship to national attention.

Built: Chester, Pennsylvania, 1875

Length: 175 feet

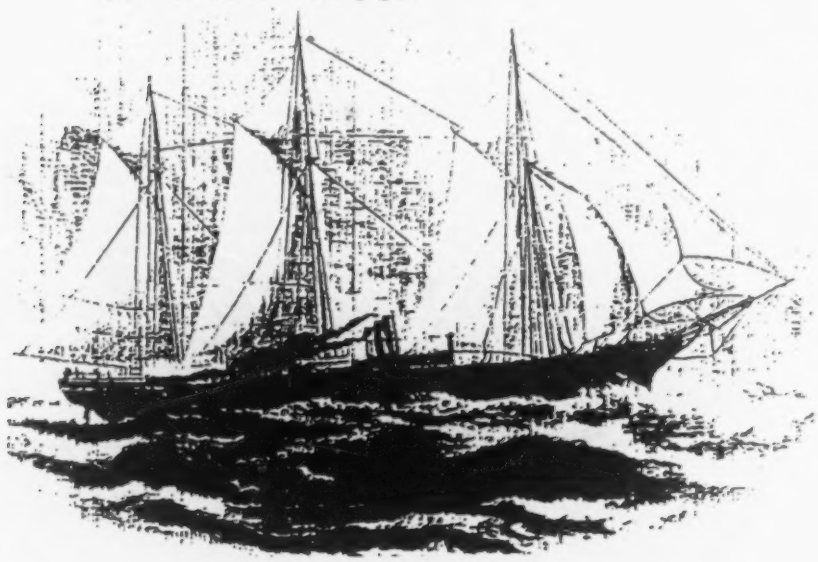
Beam: 32 feet

Draft: 13 feet

Crew: 16 officers
118 enlisted men

Power: A compound steam engine with 5 coal burning boilers and a 12-foot diameter propeller. The *Huron* also had three masts equipped with sails.

Armament:
(1) 11-inch Dahlgren smoothbore cannon
(2) 9-inch Dahlgren smoothbore cannon
(1) 60-pounder Parrot rifle
(1) 12-pounder Dahlgren boat howitzer
(1) 50-caliber Gatling gun



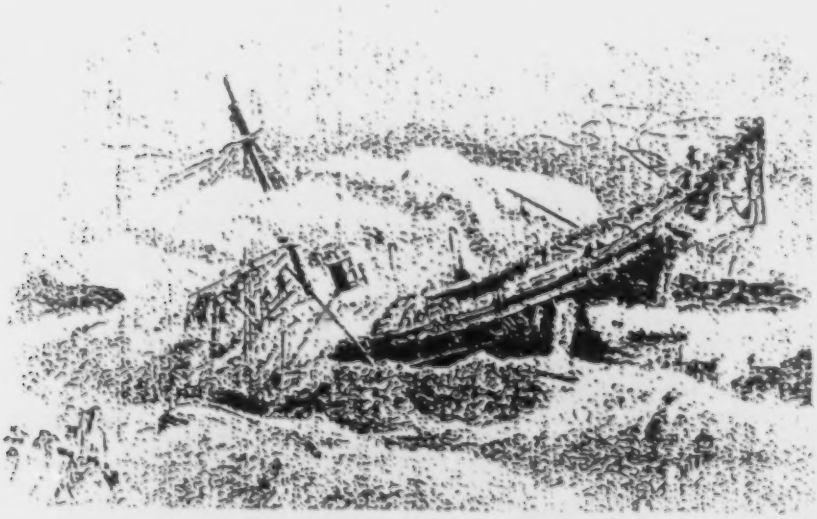
THE WRECK OF THE USS *HURON*

The *Huron* left Hampton Roads, Virginia on Friday, November 23, 1877. She was headed for Havana, Cuba to survey the surrounding coast.

On her first night out to sea, the ship encountered a heavy storm blowing from the Southeast. The storm combined with a small error in the ship's compass to cause the *Huron* to run aground at this site, at 1:30 a.m., November 24, 1877.

Even though the *Huron* was only 200 yards from the beach, the heavy surf, strong currents, and cold temperature prevented most of the crew members from attempting the swim to shore. Most of the crew tried to remain on the ship in the hope that help would arrive. However, no one came to the aid of the sailors since the Lifesaving Stations were closed until December. The elements eventually took their toll on the exposed men. Many lost their strength and were washed overboard by waves. One huge wave swept at least twelve men away at one time. In all, 98 men lost their lives during the night.

The Federal government was severely criticized for its failure to adequately fund the United States Lifesaving Service. Two months after the wreck of the *Huron*, the steamship *Metropolis* ran aground twenty-three miles to the north with the loss of 85 lives. These two disasters prompted congress to appropriate funding to build additional Lifesaving Stations along the North Carolina coast and increase their months of operation.



THE USS *HURON* TODAY

The *Huron* site is located approximately 250 yards from the beach. During the summer months buoys mark the bow and stern of the wreck. Divers and snorkelers who visit the site can see a wide variety of sea life as they swim over the remains of the historic warship. Many portions of the wreck hold points of interest such as boilers, cannonball storage racks, and the huge propeller and rudder.

This drawing and map depict the wreck of the *Huron* as she exists today. During the 1870s, the ship's cannons and much of her machinery were salvaged. Over the years, time and the elements have eroded parts of the ship, however the lower hull is well preserved, and portions of the bow remain intact up to the main deck level.

A thick layer of concretion and marine growth now cover the site hiding many structural features. Because the *Huron* is close to shore, shifting sands are continuously covering and uncovering various portions of the wreck.

All divers should follow safe scuba diving practices and it is strongly recommended that visitors check on conditions with a lifeguard before swimming out to the wreck. No one should ever swim or dive alone!

<u>Collecting artifacts from the wreck is prohibited.</u> If you observe an unusual or important artifact please do not disturb it. Note the artifacts location and report it to local authorities.

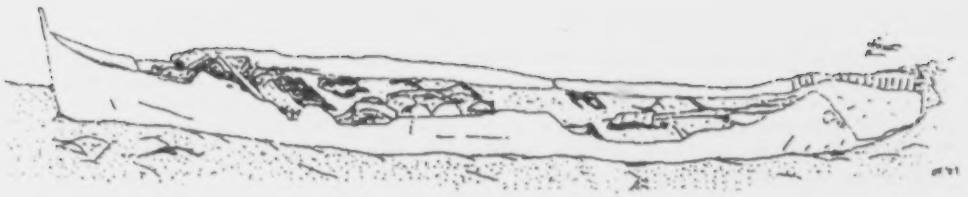
The USS *Huron* is listed on the National Register of Historic Places, and in 1991 the Secretary of the North Carolina Department of Cultural Resources designated the site as North Carolina's first "Historic Shipwreck Preserve". The preserve program is designed to promote the preservation of historic shipwreck sites, while making them more accessible to the general public.

The USS *Huron* Historic Shipwreck Preserve is administered cooperatively by the United States Navy, the Town of Nags Head, and the North Carolina Department of Cultural Resources.

The USS *Huron*, and other shipwreck sites in North Carolina's waters, are protected by State and Federal law. It is illegal to remove artifacts or disturb a shipwreck site without a valid permit.

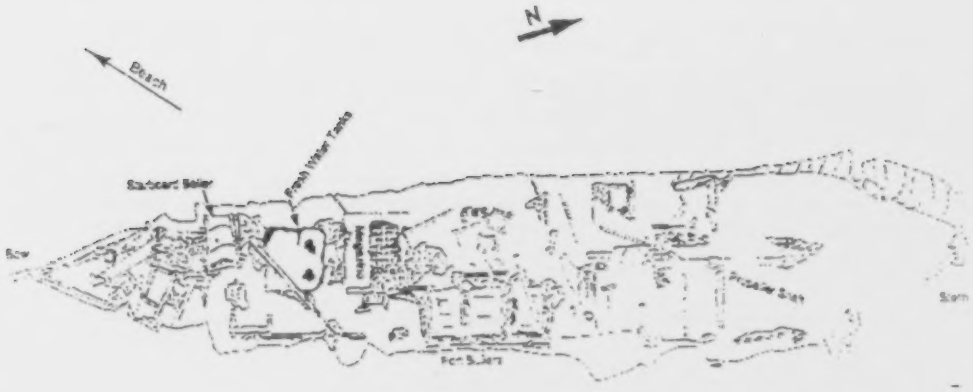
For further information on North Carolina's shipwrecks please contact:

Underwater Archaeology Unit
North Carolina Department of Cultural Resources
P.O. Box 58
Kure Beach, North Carolina 28449



Artist's Sketch of
USS Huron Shipwreck Site
Nags Head, North Carolina
0012SOB

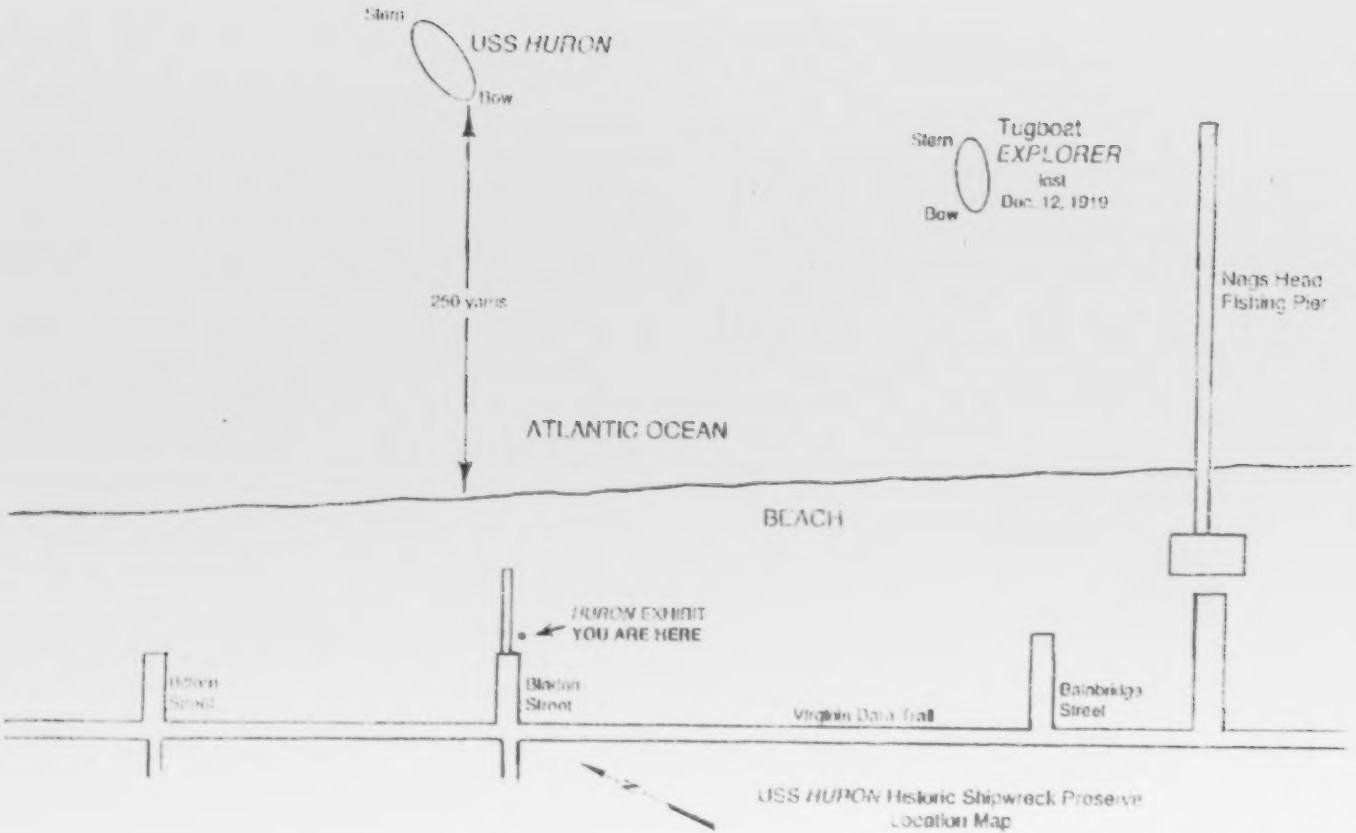
By Joe D. Friday, Jr., 1987



0' 10' 20'
SCALE

USS Huron Shipwreck Site
Nags Head, North Carolina
0012SOB

By Joe D. Friday, Jr., 1987

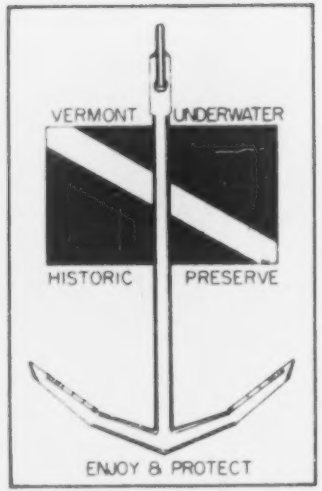

Stern
USS HURON
Bow
250 yards
Stern
Tugboat
EXPLORER
lost
Dec. 12, 1919
Bow
Nags Head
Fishing Pier
ATLANTIC OCEAN
BEACH
HURON EXHIBIT
YOU ARE HERE
Bladen
Street
Virginia Dare Trail
Bainbridge
Street
USS HURON Historic Shipwreck Preserve
Location Map

State of Vermont

The "PHOENIX"

UNDERWATER HISTORIC PRESERVE

INFORMATION and DIVING GUIDELINES



Division for Historic Preservation
Agency of Development and Community Affairs
Montpelier, Vermont

HISTORY OF THE PHOENIX I

The Lake Champlain Steamboat Company began the construction of the lake's second steamboat at Vergennes, Vermont, in 1814. Launched in 1815, Phoenix was 146 feet long, has a displacement of 325 tons, and could reach a speed of 8 knots with her 45 horsepower engine. Commanded by Captain Jehaziel Sherman, the steamer maintained a regular schedule of service, transporting people and freight between Whitehall, New York and St. Johns, Quebec, with stops at other lake ports along the route. On one occasion the Phoenix had the distinction of carrying President James Monroe.

On September 4, 1819 Captain Sherman was ill, and thus the Phoenix made her final, fateful voyage under the command of Sherman's son Richard. Leaving Burlington at 11:00 in the evening for her next destination, Plattsburgh, the steamer headed across the lake with 46 passengers and crew (most of whom were fast asleep). An unusual glow in the amidships galley provided the first warning that a fire had broken out on board, but the discovery was made too late to save the Phoenix. The passengers were rousted from their cabins in the after half of the ship and loaded into two small boats. Unfortunately, in the confusion a dozen people (including the captain) were left to fend for themselves on the burning ship. Sherman and several others were picked out of the lake in the morning, but six others were not so lucky and perished in the lake's cold, dark waters. The cause of the fire was said to have been a candle carelessly left burning in the pantry; however, circumstantial evidence suggests that the fire may have been intentionally set by competing lake shippers.

The abandoned hull drifted onto a reef off Colchester Point, and there burned to the waterline. The valuable engines and boiler were later removed and placed in a new steamboat, the Phoenix II. Winter ice probably dragged the remains of the Phoenix off of the reef and deposited the wreck in its present and final resting place on the north slope of Colchester Shoal.

Features of Interest on the Wreck:

— Size of Wreck: 146' long, 27' wide
— The fire-charred **framing ends** clearly show how the vessel was destroyed by fire and burned to the waterline; the massive **hull** is framed with oak timber.
— The **bow,** at the shallower (60') end of the dive, is prominent, jutting 15' out of the bottom.
— The **rudder hardware** is visible at the stern (110' depth) end.
— The **iron rods** which held the engines and boilers are visible in the central forward section.
— A large, **square hole** in the keelson, about 25' from the bow, is probably the mast step.

EMERGENCY INFORMATION

IN CASE OF EMERGENCY, immediately contact the Coast Guard and/or the State Police Marine Division who can quickly provide assistance.

On **Marine Band radio: use Channel 16** to immediately contact the Coast Guard.

By telephone:

Coast Guard — 864-6791

State Police/Marine Division — 655-3435 (identify the problem to the Operator and they will directly communicate with a nearby Police vessel).

Burlington Area Ambulance — 864-4554 or 911

Medical Center — 656-2345

Divers Alert Network (DAN) — (919) 684-8111

Diving accidents should be handled through the Burlington Medical Center. The nearest recompression chamber is at The University of New Hampshire in Durham.

SPECIAL DIVING CONDITIONS AND GUIDELINES:
The Phoenix Preserve

- Depth of Water: 60' - 110' (bow at 60', stern at 110') Depth will vary according to lake level fluctuations.
- The anchor pad to the Preserve buoy rests at approximately 50' depth.
- Experience level: Advance Divers.
- **REMOVAL OF ARTIFACTS, WOOD AND ANY OTHER OBJECTS AND/OR PIECES OF THE WRECK IS FORBIDDEN BY LAW.**
- Artifact removal or damaging the site is a violation of trust, as well as law, and violators will be prosecuted. Violators also jeopardize the continuing existence of the Preserve system. Take nothing but photos.
- The vessel lies on a slope in 60' - 110' of water; its depth and location on the open lake requires serious dive planning. This dive is only for experienced divers. All dives should be **NO-DECOMPRESSION DIVES** and bottom time should be well within no-decompression limits.
- MONITOR YOUR AIR. This is a deep dive and octopus regulators, pony bottles, or other types of backup breathing systems should be used. It is recommended that you leave the bottom with a minimum air reserve of 500 psi (500 psi is the minimum recommended).
- The dive may be very cold and very dark, depending on the day's conditions. Dry suits are recommended. Monitor your thermal comfort and avoid dangerous chilling.
- Underwater lights are highly recommended. Also, watch for unpredictable, severe weather changes.

CAUTION AND GOOD DIVING PRACTICES SHOULD PREVAIL AT ALL TIMES.

DIVE SAFELY!

PLEASE BE FAMILIAR WITH ALL PRESERVE GUIDELINES IN THE BLUE BROCHURE. 4/91

What Is An Underwater Preserve?

- A Preserve is an underwater historic site that has been designated a protected area of historic and recreational interest to divers.
- Under the 1975 Vermont Historic Preservation Act, all underwater historic sites beneath State waters belong to the State of Vermont in public trust. The State's responsibility is to protect, wisely manage and interpret this public heritage. Establishing a Preserve is one way to accomplish these goals by making it easy for you to safely locate historic wreck sites, by protecting the wrecks from accidental anchor damage, and by helping you to better understand the life and story of each wreck.
- Preserves are identified by Coast Guard-approved, Special Purpose, yellow buoys. These are marked "Underwater Historic Preserve" and are part of a mooring system that provides safe, easy access to wreck sites and helps protect the sites.
- A separate brochure is available for each Preserve.
- The Preserve system is experimental. If abused, this system will be discontinued. If the Preserve system works, we anticipate that divers can look forward to a continuing program, hopefully incorporating more sites in different parts of the lake in the future.

Mooring Guidelines on the Preserve

- This Preserve area is identified by two YELLOW BUOYS marked "State of Vermont Underwater Historic Preserve."
- No anchoring is permitted within 200' of a buoy.
- Divers must tie their boat to a buoy. Only one boat at one time may be tied to a buoy.
- Stay on the buoy only for the duration of the dive.
- Moored boats must fly a "divers down" flag. By law, the boat must also fly the "Alpha" flag.
- Standards, safe diving procedures relating to towing dive flags must be followed.
- No overnight mooring on the buoys.

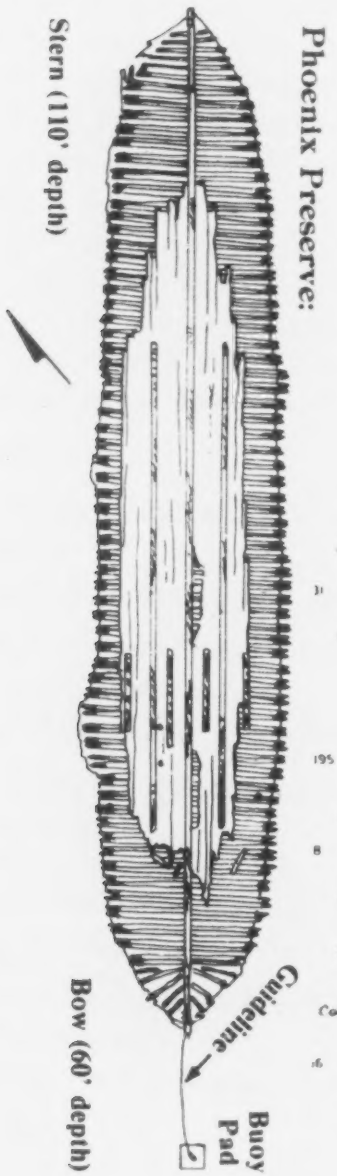
PLEASE BE FAMILIAR WITH ALL PRESERVE GUIDELINES IN THE BLUE BROCHURE.

The Vermont Underwater Historic Preserve system works and succeeds only with your cooperation. Your cooperation and responsibility are necessary to protect both the historic shipwrecks and other divers.

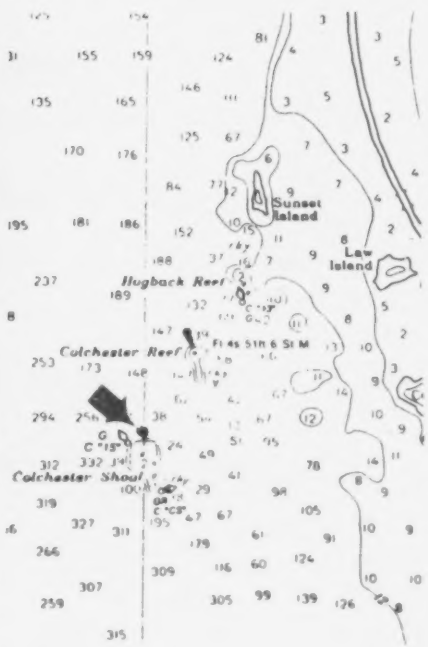
LOCATION: Northern face of Colchester Shoal reef.

SUGGESTED READING:

Davison, Rebecca, Editor, 1981. *The Phoenix Project.* Prepared for the Vermont Division for Historic Preservation by the Champlain Maritime Society, Burlington, Vermont. (Available in Burlington area libraries)



Preserve Location



APPENDIX C

REPRESENTATIONAL LISTING OF FEDERAL AND STATE MARITIME PARKS, MUSEUMS AND EXHIBITS

The following is a representational compilation of federal, state and territorial parks, sites, museums and historical societies dedicated to the preservation of maritime history, sites, properties, objects and artifacts having cultural, historic or archeological value including museums, ships and shipwreck sites. In addittion to these fine examples of maritime history are those historic vessels that are listed in the National Register of Historic Places (which are set out in Part IV of the Final Guidelines of the United States Department of Interior, National Parks Service, 55 Fed. Reg. 50,166, 50,139-50,145 (1990). Also included in this listing are some of the private museums and exhibitions dedicated to maritime history.

FEDERAL:

Isle Royale National Park (16 U.S.C. Sec. 408 *et seq.*),
Michigan
Location of many sunken vessels

Boston National Historic Park (16 U.S.C. Sec. 4102),
Boston, Massachusetts
Home of the U.S.S. Constitution ("Old Ironsides")

Maritime National Historic Park (16 U.S.C. Sec. 410nn *et seq.*)
San Francisco, California
Maritime museum, including about 12 ships of variousages and purposes.

Biscayne National Park (16 U.S.C. Sec. 410gg *et seq.*)
Miami, Florida
Location of many sunken colonial vessels

U.S.S. Monitor Marine Sanctuary (16 U.S.C. Sec. 1445)
Atlantic Ocean
Resting site of the U.S.S. Monitor, civil was ironclad

Salem Maritime National Historic Site
Salem, Massachusetts
Preservation of lands and structures having an important relationship to the maritime history of New England.

American Merchant Marine Museum
U.S. Merchant Marine Museum
Kings Point, New York
Museum dedicated the American merchant marine

Canal Park Maritime Museum
Duluth, Minnesota
Maritime history of the Upper Great Lakes owned and operated by the U.S. Army Corps of Engineers.

Naval Historical Center and Navy Memorial Museum
Washington, D.C.
The U.S. Navy's historic research center and museum reflecting the history of the U.S. Navy.

STATES:

ALABAMA:

U.S.S. ALABAMA Battleship Memorial Park
Mobile, Alabama
Preservation of the U.S.S. ALABAMA and other World War II naval vessels

CONNECTICUT:

Mystic Seaport Museum, Inc.
Mystic, Connecticut
One of America's finest maritime museums consisting of both ships and land sites to reflect the maritime history of the United States.

FLORIDA:

Urca de Lima State Underwater Archeological Preserve
Fort Pierce, Florida
Underwater remains of 1715 Spanish vessel

City of Hawkinsville
State Underwater Archeological Preserve
In the Suwannee River near Oldtown, Florida
Underwater remains of steamboat sunk in 1922.

San Pedro State Underwater Archeological Preserve
Near Islamorada, Florida
Underwater remains of 1733 Spanish vessel

GEORGIA:

Confederate Naval Museum
Columbus, Georgia

Ships of the Sea Maritime Museum
Savannah, Georgia
General maritime museum.

IDAHO:

Steamboat JEAN
Lewiston, Idaho
Restoration and preservation of strenwheeler JEAN and the maritime history of sternwheelers in the settlement of the American west.

ILLINOIS:

Great Lakes Naval and Maritime Museum
Chicago, Illinois
Maritime history of the Great Lakes.

INDIANA:

Howard National Steamboat Museum
Jeffersonville, Indiana
Dedicated to the history of steamboats on America's rivers.

MAINE:

Maine Maritime Museum
Bath, Maine
Dedicated to the maritime history of coastal Maine.

MARYLAND:

U.S.S. CONSTELLATION
Baltimore, Maryland
Sailing frigate of the War of 1812

Baltimore Maritime Museum
Baltimore, Maryland
Museum and berthing of the submarine U.S.S. TORSK and lightship CHESAPEAKE.

Chesapeake Bay Maritime Museum
St. Michaels, Maryland
Preserving the maritime history of Chesapeake Bay.

State of Maryland
Maritime Archaeology Program
Submerged Sites List
Listing over 50 historic shipwrecks lying in Chesapeake Bay and the rivers of Maryland.

MASSACHUSETTS:

Boston Tea Party Ship and Museum
Boston, Massachusetts
Preserving the history of the Boston Tea Party through a museum and the brig, BEAVER II.

MICHIGAN:

Dossin Great Lakes Museum (and the Great Lakes Maritime Institute)
Detroit, Michigan
Study and preservation of maritime history of the Great Lakes and Detroit.

MISSISSIPPI:

CAIRO Museum
Vicksburg, Mississippi
The restoration and preservation of the U.S.S. CAIRO, civil war ironclad sunk in the Mississippi River.

NEBRASKA:

Missouri River History Museum
Brownville, Nebraska
Maritime history of the Missouri River.

NEW YORK:

South Street Seaport Museum
New York, New York
Maritime history of New York harbor.

Whaling Museum
Cold Spring Harbor, New York
History of whaling.

H. Lee White Marine Museum
Oswego, New York
Includes maritime history of Lake Ontario.

NORTH CAROLINA:

U.S.S. HURON State Historic Shipwreck Preserve
Kure Beach, North Carolina
Underwater remains of U.S.S. HURON sunk during a storm in 1877.

OHIO:

Great Lakes Historical Society Museum
Vermillion, Ohio
Preservation of maritime history of the Great Lakes and Lake Erie.

OREGON:

Columbia River Maritime Museum
Astoria, Oregon
Museum and lightship COLUMBIA dedicated to the maritime history of the Columbia River and the Pacific Northwest.

PENNSYLVANIA:

Cruiser, U.S.S. OLYMPIA
Philadelphia, Pennsylvania
Preservation of the U.S.S. OLYMPIA, Admiral Dewey's flagship at the battle of Manila Bay, Philippine Islands during the Spanish-American War in 1898.

Philadelphia Maritime Museum
Philadelphia, Pennsylvania
Maritime history of the Delaware River and Bay.

RHODE ISLAND:

Herreshoff Marine Museum
Bristol, Rhode Island
Preservation of the Herreshoff yachts.

H.M.S. "Cerberus" and H.M.S. "Lark"
In Narragansett Bay near Aquidneck Island
Wreck sites of two Revolutionary War British vessels.

SOUTH CAROLINA:

Patriot's Point Naval and Maritime Museum
Mt. Pleasant (Charleston), South Carolina
Preservation of 20th Century merchant vessels and warships with an emphasis on aircraft carriers.

TEXAS:

Battleship TEXAS State Historical Park
La Porte, Texas
Preservation of the World War I and II battleship U.S.S. TEXAS.

VERMONT:

Lake Champlain Maritime Museum
Basin Harbor, Vermont
Maritime history of Lake Champlain.

The "Phoenix" State Underwater Historic Preserve
In Lake Champlain
Steamboat sunk in 1819.

The "General Butler" State Underwater Historic Preserve
In Lake Champlain
Lake sailing vessel sunk in 1876.

The "Coal Barge" State Underwater Historic Preserve
In Lake Champlain
Lake/canal barge (A.R. NOYES) sunk in 1884.

The "Horse Ferry" State Underwater Historic Preserve
In Lake Champlain
Horse powered ferry believed sunk in 1840's.

VIRGINIA:

Yorktown Shipwrecks State Maritime Archeological Site
In the York River at Yorktown, Virginia
Sunken remains of the Revolutionary War British vessels sunk by the American and French forces during the 1781 siege of Yorktown.

U.S.S. CUMBERLAND State Maritime Archeological Site
In the James River at Newport News, Virginia
Remains of the U.S.S. CUMBERLAND sunk by the ironclad C.S.S. VIRGINIA (also known as the "MERRIMACK") in the Civil War.

C.S.S. FLORIDA State Maritime Archeological Site
In the James River at Newport News, Virginia
Remains of the ironclad C.S.S. FLORIDA sunk by the Confederates in Civil War.

Mariner's Museum
Newport News, Virginia
One of the nation's finest maritime museums.

WISCONSIN:

Manitowoc Maritime Museum
Manitowac, Wisconsin
Maritime museum of the Upper Great Lakes.

Wisconsin Marine Historical Society
Milwaukee, Wisconsin
Maritime history of the Great Lakes and the St. Lawrence Seaway.

TERRITORIES:
PUERTO RICO:

Museo de Historia Militar y Naval de Puerto Rico
San Juan, Puerto Rico
Includes the maritime history of Puerto Rico

MOTION FILED
FEB 10 1993

No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ADJUNCT SCIENCE AND EDUCATION ASSOCIATION AND PROGRAM IN SUPPORT OF PETITIONER

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Counsel for Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE ADJUNCT SCIENCE AND EDUCATION ASSOCIATION AND PROGRAM IN SUPPORT OF PETITIONER

The Adjunct Science and Education Association and Program moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The Adjunct Science and Education Association and Program was created under the auspices of Columbus-America Discovery Group in January 1989 to undertake scientific and educational endeavors as part of the exploration of the shipwreck site of the *S.S. Central America*. The program involves more than one hundred researchers and scientists from approximately 65 institutions, includ-

ing academic institutions, museums, historical societies, governmental agencies, research laboratories and oceanographic institutions. The researchers and scientists participating in the Adjunct Science and Education Association and Program have associated for the purpose of deep-sea study in conjunction with the *S.S. Central America* Project. The program was initiated to ensure that the rare opportunity to gain new knowledge of deep ocean features, biota and other processes at the site of the *S.S. Central America* was not lost. Further, the science program seeks to maintain archives of samples, photographs, and other technical data for use by the scientific community and for translation to educational and public interest documents.

Because of the nature of this project, and the opportunity for ocean research that it presents, a coordinated science program is needed to ensure that this opportunity to gain new knowledge of deep ocean features is not lost. The vast seas of our world remain essentially unknown. Advances in marine technology, however, have made deep-sea exploration and research feasible, and the oceans' abundant resources—historical, biological, medical and chemical—hold great promise for all.

The incentives provided by the certainty and predictability of the maritime law of finds—which was effectively destroyed by the decision below—encourage multidisciplinary efforts involving teams of chemists, biologists, oceanographers and historians to discover the extraordinary deep sea community of life forms, to recover a lost part of America's heritage, to advance scientific progress, and to provide educational programs. The Fourth Circuit's decision could well herald the end of responsible exploration and recovery of long-lost shipwrecks and may irreversibly damage the vast potential of scientific information available from these finds.

Dividing shipwreck sites into a multiplicity of interests, according to ancient claims of ownership, will dis-

rupt their scientific and historic integrity and unity. Furthermore, fractured ownership interests will remove important scientific infomation from its context, thus precluding the full realization of the potential value of shipwrecks as unique scientific laboratories.

Without the responsible handling and development of shipwreck sites, the multidisciplinary scientific effort required to gain valuable information from the deep sea cannot occur. The Fourth Circuit's decision threatens to halt all future multidisciplinary efforts that utilize the wealth of information available at shipwreck sites. If such efforts are thwarted by the decision below, we could lose a tremendous opportunity to expand our scientific knowledge.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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Counsel for Amicus Curiae

February 1993

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, nonuse, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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Columbus-America Discovery Group, Inc. v. Unidentified and Abandoned Sailing Vessel, 1989 AMC 1955 (E.D. Va. 1989) 7
The Elfrida, 172 U.S. 186 (1898) 7
Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) 7
Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985) .. 7
Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059 (1st Cir. 1987) 7
Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A., 792 F.2d 989 (11th Cir. 1986) 7
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43 U.S.C. § 2101 *et seq.* 8
16 U.S.C. § 470 *et seq.* 9
16 U.S.C. § 470(b) (4) 9

Miscellaneous

Charles Herdendorf, *Discovery in an Alien Environment*, American History Illustrated, Mar.-Apr. 1991, at 66 ..... 4, 5, 10
U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation—Background Paper*, OTA-BP-E-37, 8 (1987) 9

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INTEREST OF AMICUS CURIAE

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The association approaches the study of the *S.S. Central America* as a multidisciplinary effort, providing opportunities for qualified researchers in a variety of fields to conduct deep-sea scientific investigation. Because of the nature of this project, and the opportunity for ocean re-

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* Participants in the Adjunct Science and Education Program have studied a variety of subjects in connection with the *S.S. Central America* Project, including 1) pteropods; 2) deep-sea benthic communities; 3) deep-sea sharks & fish communities; 4) deep-sea fishes & fisheries; 5) marine invertebrates; 6) biochemistry of deep-sea sponges; 7) biology of deep-sea sponges; 8) sea anemones; 9) marine algae; 10) hexactinellid sponges; 11) microorganims; 12) marine fungi; 13) marine mammals; 14) deep-sea crustaceans; 15) greenland sharks; 16) fossil glass sponges; 17) actinomycets; 18) crinoids; 19) habitat assessment-fisheries; 20) deep-sea antipharians; 21) marine microbiology; 22) deep-sea invertebrates; 23) aquatic plants; 24) biogeography; 25) marine education; 26) wood-boring mollusks; 27) cephalopods; 28) galatheid crabs; 29) deep-sea mollusks; 30) design of deep-sea biological experiments; 31) history; 32) benthic microbiology; 33) bryozoans; 34) steamship construction history; 35) steamship engineworks; 36) pharmacological screening of sponge tissues; 37) history of the *S.S. Central America* & Commander Herndon; 38) mineralogy of gold nuggets; 39) deep-sea methane; 40) deep-sea sediment; 41) ocean & sediment dynamics; 42) hurricane metcorology; 43) x-ray analysis of wood from shipwrecks; 44) geology & oceanography of the North Atlantic Ocean; 45) exhibit design; 46) undersea archaeology; 47) deep-sea corrosion; 48) undersea photography; 49) metals analysis; 50) wood analysis; 51) deep-sea rusticles; 52) formation of rusticles; 53) deep-sea sediment imprints; 54) medicinal chemicals in marine life; 55) logistics; 56) diaton microphotographs; 57) mathematical search theory; 58) history of the gold rush period; and 59) bathymetric data.

search that it presents, a coordinated science program is needed to maximize this opportunity to gain new knowledge of deep ocean features. However, if the decision below is allowed to stand, it will serve as a constructive barrier for groups, such as the Adjunct Science and Education Association and Program, wishing to study shipwrecks. Thus, the *amicus* respectfully requests that the Court grant certiorari in this case.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE ISSUE PRESENTED BY THIS CASE HOLDS WIDESPREAD SIGNIFICANCE FOR NUMEROUS AREAS OF HUMAN ENDEAVOR

The vast seas covering our world remain essentially unknown. Advances in marine technology, however, have made deep-sea exploration and research feasible, and the oceans' abundant resources—historical, biological, medical and chemical—hold great promise for all. The Court's decision to grant certiorari in this case will have a direct impact on whether and when that promise is fulfilled.

A. To Properly Discover, Recover, and Conserve Long-Lost Shipwrecks Requires a Multidisciplinary Effort, Bringing Together an Array of Natural and Social Sciences and the Arts

Due to the vast and diverse potential of ocean exploration, a study of shipwrecks must be multidisciplinary: ocean engineering, marine biology, navigation, probability analysis and mathematics, oceanography—as well as a host of other natural sciences—play an important role in the responsible exploration of shipwrecks, and provide a unique opportunity for development in each of these disciplines.

Dividing shipwreck sites into a multiplicity of interests, according to ancient claims of ownership, will disrupt their scientific and historic integrity and unity.

Fractured ownership interests will remove important scientific information from its context and will preclude the full realization of the potential value of shipwrecks as unique scientific laboratories.

B. The Discovery, Recovery and Conservation of Long-Lost Shipwrecks Present Enormous Opportunities in Medicine, Food Production, and Energy Development

1. *The Multidisciplinary Study of Shipwreck Sites Provides a Unique Opportunity For New Advances in Biomedical Research*

Due to the fact that half of our drugs come from living things and because the ocean is home to about 80 percent of all plants and animals, the sea may well be a storehouse of many useful medications. Certain marine animals, such as sponges and lunicates, are rarely eaten because their tissue contains noxious chemicals that ward off predators. The protective chemicals produced by the sponges make them excellent candidates for biomedical research. Charles Herdendorf, *Discovery in an Alien Environment*, American History Illustrated, Mar.-Apr. 1991, at 66, 71 [hereinafter Herdendorf, *Discovery*], Deep-sea animals have been shown to have a number of disease fighting capabilities, including: (1) anti-viral, (2) anti-fungal, (3) anti-tumor (cancer ameliorating drugs), (4) anti-inflammatory (arthritis drugs), and (5) immunomodulatory (drugs that stimulate or suppress immune response). One of the most exciting discoveries from the exploration of the ocean might be a new drug that will benefit all of us. Normally, it would be very difficult for scientists to obtain specimens from great ocean depths, but new technology developed by ocean explorers has the capacity for collecting and securely storing samples that has greatly simplified this task.

2. *Responsible Recovery and Conservation of Long-Lost Shipwrecks Will Continue to Expand Our Scientific Knowledge of the Deep-Sea Floor*

Along with the potential for progress in the area of biomedical research, the study of shipwreck sites also affords research opportunities in the areas of bioscience, physical and chemical studies and historical archaeology. For example, at the *S.S. Central America* site, these experiments include (1) deterioration of metal objects, (2) microbiological studies, (3) wood degradation, (4) indexing abyssal fauna, (5) concentration and composition of the food chain, (6) sedimentation studies, (7) biomedical and biochemical research, and (8) development of historical information.

When Columbus-America Discovery Group discovered the wreck of the *S.S. Central America*, it recognized the unique opportunities the wrecksite provided for scientific exploration. To realize the full potential of the *S.S. Central America*, Columbus-America Discovery Group, in conjunction with the Adjunct Science Program, placed a variety of experiments at the shipwreck site. Herdendorf, *Discovery*, at 71. This one extraordinary research effort has led to the discovery of eleven new species of sea life, some of which are being studied for antigens in the fight against cancer and other diseases, and others of which are being studied to assist in increasing our food production. *Id.* The Adjunct Science Program has also had the rare opportunity to observe the feeding, courtship and mating behavior of many deep-sea species that have rarely or never been filmed before. *Id.* The Program has also observed a Greenland shark at the shipwreck site, about one thousand miles south and more than three thousand feet deeper than any earlier recording. *Id.* Because less than 1% of the deep-sea floor has been explored, all of these observations are important contributions to our scientific knowledge.

Without the responsible handling and development of shipwreck sites, as exemplified by Columbus-America Dis-

covery Group, the multidisciplinary scientific effort required to gain valuable information from the deep-sea cannot occur.[2] The Fourth Circuit's decision threatens to halt all future multidisciplinary efforts to utilize the wealth of information available at shipwreck sites. If such efforts are thwarted by the decision below, we could lose a special opportunity to expand our scientific knowledge.

II. THE OPINION BELOW IS CONTRARY TO THE LAW AND DETRACTS FROM THE MULTIDISCIPLINARY OPPORTUNITIES OFFERED BY RESPONSIBLE SHIPWRECK DISCOVERY, RECOVERY AND CONSERVATION

A. The Opinion Essentially Obliterates the Law of Finds According Title to Finders Who Reduce Long-Lost Property to Possession

Maritime law recognizes two theories under which persons are given incentives to recover shipwrecks. The law of commercial salvage is traditionally applied to ships that have recently been lost or are in imminent risk of loss through a marine peril. Under the law of salvage, the salvor is compensated for its services through the enforcement of a maritime lien on the property recovered. Salvage law is usually applied in circumstances where the owners of the ship and cargo are known or easily determined.

In the case of long-lost shipwrecks, however, the application of commercial salvage concepts is impractical because the determination of ownership of such wrecks is

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[2] For instance, Columbus-America Discovery Group has recovered artifacts from the *S.S. Central America* in a meticulous manner,

> [b]ecause each artifact has to be carefully catalogued, photographed, and preserved . . . . The team's primary archaeological goal has been to establish an adequate record with a minimum amount of disturbance to the wreck, allowing for future opportunities for detailed study and interpretation.

Herdendorf, *Discovery*, at 71.

made speculative, if not impossible, by the passage of time, loss or destruction of records, absence of witnesses, and the often destructive effects of the harsh marine environment on the wreck and its contents. Therefore, the maritime law of finds has become the overwhelming law of the land for adjudicating rights to long-lost wrecks. *See, e.g., Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1064-65 (1st Cir. 1987); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *see also Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (noting that the "disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.")

In applying the law of finds, the admiralty courts have established the threshold requirement that the finder act in good faith to protect the scientific, historic and archaeological values of the shipwreck. *Columbus-America Discovery Group, Inc. v. Unidentified and Abandoned Sailing Vessel*, 1989 AMC 1955 (E.D. Va. 1989). By contrast, a court has no power to impose such a requirement on an alleged owner. The alleged owner, acting either directly or through contract salvage, may do whatever it desires with its property, without regard to the destruction of the scientific and historic values of shipwrecks. Indeed, insurers typically handle salvage on a "no cure, no pay" basis; salvors are compensated solely for salving the insurers' alleged property—not for protecting the interests of others. *See Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 713 n.11 (1982). *See also The Elfrida*, 172 U.S. 186, 192 (1898) (recognizing an early form of "no cure, no pay" contract); *Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 792 F.2d 989, 992 (11th Cir. 1986) ("no cure, no pay" is "the most widely used salvage contract in the world"); *Alva Steamship Co. v. City of New York*, 616 F.2d 605, 610 (2nd Cir. 1980) ("no cure, no pay"

"is standard in the salvage trade"). Therefore, the application of the law of commercial salvage not only flies in the face of established maritime law, but it threatens to destroy the scientific and histroical value of shipwreck sites. Moreover, virtually all protective regulations of cultural property assume abandonment of the rights of prior owners. *See* Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101 *et seq.* (1988). Thus, the Fourth Circuit's decision emasculates the recent progress of both state and federal legislation implementing protection for long-lost and abandoned shipwrecks.

B. The Fourth Circuit's Decision Undermines Certainty and Predictability Regarding Title to Items Found On the Seabed

The decision below, as a practical matter, makes it impossible to prove abandonment of and to quiet title to ocean resources. Applying the Fourth Circuit's decision, no factual showing of abandonment based on circumstantial evidence can ever be made. The court first notes that finds law should be applied "when . . . property has been abandoned by its previous owners." *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 461 (4th Cir. 1992). However, the court found that abandonment must be proved by "clear and convincing evidence," such as the express abandonment of property by the previous owner. *Id.* at 464. Thus, under the Fourth Circuit's test, no aabndonment can be found absent an express declaration renouncing title. The decision effectively invites claims of ownership, scores of years old, to cloud title to property found at sea, blighting the freedom of movement and discovery that are the very foundation of the international law of the sea.

By according a presumption of ageless vitality to purported ownership interests in long-lost shipwrecks, the Fourth Circuit's decision undermines the certainty and predictability previously accorded explorers who have

found, taken into possession, and conserved ancient items on the seabed. The incentives provided by the certainty and predictability of the maritime law of finds—which was effectively destroyed by the decision below—encourages multidisciplinary efforts involving teams of chemists, biologists, oceanographers, and historians to discover the extraordinary deep-sea community of life forms, to recover a lost part of America's heritage, to advance scientific progress and to provide educational programs.

C. The Opinion Below Will Hamper Future Scientific Exploration of Long-Lost Shipwrecks and Will Foster the Destruction of Historical Information, as Well as the Loss of Scientific Knowledge

If the Fourth Circuit's decision is allowed to stand, it will not only threaten the future of scientific exploration, it will also threaten to destroy a valuable source of historical information. The preservation of historical information is important to America's cultural heritage and is recognized as our national public policy in the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (1988). Congress has declared that:

> [T]he preservation of [our] irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.

16 U.S.C. § 470(b)(4). The Fourth Circuit's decision places in jeopardy a vast wealth of historical information that is often contained in shipwrecks. The study of historic shipwrecks gives historians a valuable insight into trade, shipboard life and the interaction between the Old and New Worlds in the exploration and settlement of this country. U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation—Background Paper*, OTA-BP-E-37, 8 (1987).

Often, a shipwreck site is identified by artifacts found on the wreck. In fact, Columbus-America Discovery Group

used artifacts, such as the ship's bell and period pottery, to confirm the identity of the shipwreck. Herdendorf, *Discovery*, at 70. The court of appeals' decision, however, discourages finders from investigating conditions, items and structures at the wrecksite that may link a particular recovered artifact with a particular crew member, shipper or pasenger. In effect, the finder of a shipwreck has a disincentive to develop historical information that might reveal invaluable information about our rich historical and cultural heritage.

A system that penalizes scientific and historical inquiry is wrong. If a finder develops evidence linking a particular long-lost item with a long-gone crew member, cargo interest or passenger, the finder may be penalized, under the court's holding, with a lawsuit by the descendants. The law should not support such a perverse result.

CONCLUSION

The Fourth Circuit's decision could well herald the end of responsible exploration and recovery of long-lost shipwrecks and may irreversibly damage the vast potential of scientific information available from such shipwrecks.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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